Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JAMES SMITH, SILAS HARDISON, DAVID ROBBINS, JAMES CONWAY, RITA KRAPF, NESBY MOORE, VINCENT SCHOEMEHL,

Petitioners,

v.

TIMOTHY RUSH,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether trial error that is not structural in nature, such as improper judicial commentary made during the course of a civil trial, is reversible for plain error based on its potential for prejudice, absent any requirement of actual prejudice or of facts supporting a presumption of prejudice.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Federal Rules Involved	2
Statement	3
Reasons for Granting the Petition	8
Conclusion	14
Appendix	A-1, *et seq.*

TABLE OF AUTHORITIES

Page(s)

Cases:

Angelo v. Armstrong World Indus., Inc., 11 F.3d 957 (10th Cir. 1993) 12

Arizona v. Fulimante, 499 U.S. 279 (1990) 10

Aves v. Shah, 997 F.2d 762 (10th Cir. 1993) 12

Braxton v. United States, 500 U.S. 344 (1991) 12

Business Guides Inc. v. Chromatic Communications Ent., Inc., 498 U.S. 533 (1991) 13

Champagne v. United States, 40 F.3d 946 (8th Cir. 1994)..... 12

Glover v. BIC Corp., 6 F.3d 1318 (9th Cir. 1993) 11

Hammer v. Gross, 932 F.2d 842 (9th Cir.), *cert. denied*, 502 U.S. 980 (1991) 11

Highlands Insurance Co. v. National Union Fire Ins. Co., 27 F.3d 1027 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 903 (1995) 11,13

Metromedia Co. v. Fugazy, 983 F.2d 350 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2445 (1993) 12

Rush v. Smith, 56 F.3d 918 (8th Cir. 1995) 1,7

Rush v. Smith, 45 F.3d 1197 (8th Cir. 1995) 2,7

Smith v. Gulf Oil Co., 995 F.2d 638 (6th Cir. 1993) 11,12

United States v. Antar, 53 F.3d 568 (3d Cir. 1995)..... 12

United States v. Atkinson, 297 U.S. 157 (1936) 10

United States v. Blake, 941 F.2d 334 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 596 (1992) 11

United States v. Cole, 27 F.3d 996 (4th Cir. 1994) 12

United States v. Davis, 15 F.3d 1393 (7th Cir.), *cert. denied*, 115 S. Ct. 250 (1994) 12

United States v. Frady, 456 U.S. 152 (1982) 13

United States v. Olano, 113 S. Ct. 1770 (1993) 7,8,9,10, 11,12,13

United States v. Whiting, 28 F.3d 1296 (1st Cir. 1994) 12

United States v. Young, 470 U.S. 1 (1985) 10,13

Statutes and Rules:

28 U.S.C. § 636 3

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1343 3

42 U.S.C. § 1983 3

Federal Rule of Civil Procedure 51 2,8,11

Federal Rule of Criminal Procedure 52(b) 2,8,9

Federal Rule of Evidence 103(d) 2,8

Other Authorities:

Jeffrey L. Lowry, Clarifying Plain Error Analysis Under Rule 52(b) of the Federal Rules of Civil Procedure, 84 *Journal of Criminal Law & Criminology* 1065 (1994) 12

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James Smith and Silas Hardison, St. Louis City police officers, and David Robbins, James Conway, Rita Krapf, Nesby Moore and Vincent Schoemehl, named members of the St. Louis Board of Police Commissioners, respectfully petition for a writ of certiorari to review the June 5, 1995, judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The en banc opinion of the court of appeals (App. at A1-29) is reported as *Rush v. Smith*, 56 F.3d 918 (8th Cir. 1995). The

vacated panel decision of the court of appeals (App. at A31-5[illegible]) is reported as *Rush v. Smith*, 45 F.3d 1197 (8th Cir. 1995).

JURISDICTION

The judgment of a three-member panel of the court of appeals was entered on January 23, 1995. On March 16, 1995, the court of appeals granted rehearing en banc and vacated the panel's opinion. The judgment of the court of appeals en banc was entered on June 5, 1995. This petition is timely filed within ninety days of June 5. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

FEDERAL RULES INVOLVED

Federal Rule of Criminal Procedure 52(b) provides in pertinent part:

> Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Federal Rule of Civil Procedure 51 provides in pertinent part:

> No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Federal Rule of Evidence 103(d) provides in pertinent part:

> (a) Effect of erroneous ruling
>
> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> (1) Objection

In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground for objection, if the specific ground was not apparent from the context;

. . .

(c) Hearing of jury

In jury cases, proceedings shall be conducted to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain Error

Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

STATEMENT

Timothy Rush, an African-American, brought this action under 42 U.S.C. § 1983 claiming that two police officers used excessive force against him. The United States District Court for the Eastern District of Missouri had original jurisdiction over the case pursuant to 28 U.S.C. § 1343. Following an eight-day trial before a United States Magistrate Judge pursuant to 28 U.S.C. § 636, a jury found in favor of defendants on all of Rush's claims. Resolution of the matter in part required the jury to choose between two conflicting accounts of events that transpired during the early morning of January 1, 1990. (See App. at A2.)

At trial, Officer Hardison, an African-American, and Officer Smith, a Caucasian, testified that they were dispatched to Rush's neighborhood in response to a report that shots had been fired. The officers testified that they were fired upon with several shotgun blasts when they approached Rush's backyard, and that

they saw two men standing below the steps at the rear of the home. The officers testified they returned fire. Rush claimed, however, that he was inside his home when a friend was in his backyard firing shots into the air. Rush testified that he approached his back door to tell his friend to cease firing, and while standing inside the doorframe, he was shot in the abdomen by one of the officers. Testimony of Rush's cousin, who is African-American, corroborated Rush's version of the facts. A variety of other witnesses, some African-American and some Caucasian, testified in support of each side. (See App. at A2-3.)

A jury of eight initially was impaneled to hear the case, including one African-American. On the fourth morning of trial, after a severe snowstorm, the African-American juror advised the court that she would not appear due to the inclement weather. The trial judge decided to proceed with the trial without the absent juror, and then explained her absence to the remaining jurors:

> I want to compliment you all for making it. Be seated and be comfortable. Your eyeballs will indicate that your Juror Number Two is absent and we've previously discussed that, so we're going to proceed without her. Something just occurred to me, though, when I was being mildly scolded by the Plaintiff's attorneys for starting court late, that it was this Court's insistence or relative insistence that we have a black juror in this case, that put the black juror to the missing juror, Dorothy Mae Bluett in the box. I told all of you and I'm going to say this in front of the jury, it doesn't make any difference. It's a truth and I'm not afraid of the truth, but I was sincerely afraid of striking the only two blacks that were on that jury, that the Court of Appeals would look askance at anybody being able to single out a particular race and eliminating them from consideration of this jury, so I, and I'm gonna take credit for this I'm sorry. I've got to, I've got to preserve the justice and pursuit of justice by this Court, prevailed upon the City to put at least

> one of those black ladies on this panel so that Mr. Rush would be at least represented ethnic-wise or race-wise. I just, I'm not a damn fool. I haven't been around here for seventy-six years and not found out that the races have a tendency to stick together and that may be good or bad, but whatever it is, it exists. She is not here through no fault of anybody here. The Marshal was talking about going out and getting her and there was a phone communication from her that she wasn't coming out in this weather under any circumstances. That's why I had eight jurors. That's why I had two extras in case I lost one to weather or illness or anything else. Now I've got seven. My position is getting a little more tenuous, but that's alright. I got seven, so I'm gonna go with seven. Now let's go.

(App. at A53; IV Trial Tr. at 19.) There was no formal objection after these remarks, although counsel approached the bench and engaged in the following exchange regarding the jury selection:

> MR. FITZGIBBON (counsel for defendants): Can I approach the bench?
>
> THE COURT: You have something?
>
> MR. FITZGIBBON: Judge, I don't,— I was not really, I was listening, but did you indicate to the jury which side struck the juror?
>
> THE COURT: No, I did not.
>
> MR. FITZGIBBON: Because,—
>
> THE COURT: I didn't, no, I would not do that.
>
> MR. FITZGIBBON: Okay.
>
> THE COURT: Of course not. I just said it came to me that way and I was disturbed by it. I didn't say who struck them.

MR. SINGER (counsel for Rush): Okay, what else?

MR. DICK (counsel for Rush): Your Honor, I couldn't tell if I'd been away from the microphone. I know the Court's intention is good, but I would just, I think what was said might give the impression that the City was the one who graciously put the black juror on.

THE COURT: I put the black juror on. I said, "I did it." I asked the attorneys to do it. I didn't say which one.

. . . .

MR. SINGER: I thought the City gracious, — I thought you used the term that the City graciously agreed and maybe I'm mistaken, Judge but,—

THE COURT: Well, I'll clear it up if I did.

MR. SINGER: Well, now Judge, I think that'll only emphasize what was done.

THE COURT: Well, what do you want me to do?

MR. SINGER: Well, I mean, I'd like to go on and try this case, If your Honor thinks he can correct the measure without any further emphasis,—

THE COURT: Okay, let's go.

MR. SINGER: —then I would agree to it, but,— Okay. The first witness, we had asked the City to produce Mr. Scott.

(App. at A54-55; IV Trial Tr. at 20-21.)

On appeal, Rush argued, among other things, that the trial judge's comment regarding the tendency of the races "to stick together" amounted to plain error. In a 2-1 panel opinion, the majority inquired whether the court's comment destroyed the overall fairness of the trial, that is, whether the complaining party

was prejudiced by the comment. *Rush*, 45 F.3d at 1202; App. at A38. The majority concluded the comment did not indicate a preference for one party over another, and did not reach the merits of the case or disparage Rush. After considering the weight of the comment in the context of the entire trial, the majority concluded Rush was not prejudiced. 45 F.3d at 1202-03; App. at A39.

The court of appeals then vacated the panel decision and reheard the case en banc. (App. at A30.) A seven-member majority reversed and remanded for a new trial, concluding the trial judge's comment amounted to plain error. The majority concluded in light of the importance of witness credibility that the "possible effect" of the comment on the jury was sufficient to merit a new trial. 56 F.3d at 923; App. at A11. The court characterized the trial judge's comment as one that appeals to bias or racial prejudice and held the "potential for prejudice in the minds of the jurors was so great that no specific showing of actual prejudice is required." 56 F.3d at 923; App. at A11. The concurring opinion concluded that the comment constituted plain error because it "give[s] rise to a rebuttable presumption of prejudice." 56 F.3d at 924; App. at A12. Although concluding the comment is of the type to be considered presumptively prejudicial under *United States v. Olano*, 113 S. Ct. 1170, 1178 (1993), the concurrence disagreed with the majority that a "possible effect" or "potential for prejudice" was sufficient under Supreme Court or Eighth Circuit precedent to establish plain error. 56 F.3d at 924; App. at A12.

A three-member dissent recounted the plain error standard set forth in *Olano* and first concluded the error was not of the special category of forfeited errors that can be corrected regardless of effect on outcome. 56 F.3d at 925-29; App. at A17-23. The dissent next concluded Rush failed to show specific prejudice and failed to show that prejudice should be presumed. 56 F.3d at 929-32; App. at A23-29.

REASONS FOR GRANTING THE PETITION

Introduction

Federal Rule of Criminal Procedure 52(b) provides that "plain errors or defects affecting substantial rights may be noticed" absent an objection at trial. Federal Rule of Evidence 103(d) similarly provides that a "plain error" in the admission or exclusion of evidence may be corrected, although not objected to at trial, as long as it affects substantial rights of the complaining party. Plain error further is recognized by most courts of appeals as a judicially created exception to Federal Rule of Civil Procedure 51. This Court has not heretofore distinguished among different contexts of plain error review, and it most recently set forth its stringent standard for noticing plain error in *United States v. Olano*, 113 S. Ct. 1770 (1993), a criminal proceeding.

In the case at bar, the Court of Appeals for the Eighth Circuit in its majority opinion failed to adhere to the stringent standard set forth in *Olano* and prior Supreme Court precedent, and overstepped its remedial authority by reversing for plain error a forfeited trial error that did not affect any substantial rights of the appellant, a plaintiff in a civil matter. The diverging opinions of the judges of the Eighth Circuit after rehearing this case en banc, along with diverging opinions of other courts of appeals undertaking plain error review since *Olano*, evince a lack of uniformity in the courts' application of plain error review. If the erroneous decision of the court of appeals in this case is allowed to stand, Petitioners will be forced to repeat a lengthy trial due to a forfeited trial error that affected no substantial rights of the appellant and that the appellate court had no authority to correct, and the federal appellate courts will remain divergent in their application of plain error review. Accordingly, this Court should grant certiorari in this matter.

I. The Petition Ought To Be Granted Because The Question Presented Herein Has Been Decided By The Court Of Appeals For The Eighth Circuit In A Manner Inconsistent With Decisions Of The Supreme Court.

The Court of Appeals erred in concluding that an improper judicial comment made during the course of a civil trial is reversible for plain error because of its "potential for prejudice" and its "possible effect" on the jury. The court of appeals' decision is contrary to decisions of this Court recognizing that trial errors, as compared to structural errors, do not constitute plain error absent a showing of prejudice or showing of facts supporting a presumption of prejudice. By concluding the trial judge's comment amounted to reversible error, the Eighth Circuit acted outside its remedial authority, contrary to the standard set forth in *United States v. Olano*, 113 S. Ct. 1770 (1993) and prior Supreme Court cases.

In *Olano*, this Court when construing plain error in the context of Federal Rule of Criminal Procedure 52(b) stated that a "forfeited error 'may be noticed' only if it is 'plain' and 'affect[s] substantial rights.' More precisely, the Court of Appeals may *correct* the error . . . only if it meets these criteria." 113 S. Ct. at 1777 (quoting Fed. R. Crim. P. 52(b)). To be plain, the error must be clear or obvious. *Id.* at 1777-78. Normally, substantial rights are not affected absent a specific showing of prejudice, meaning the error affected the outcome of the district court proceedings. *Id.* at 1778. The party complaining of plain error bears the burden of showing prejudice. *Id.* Substantial rights may be affected without a showing of actual prejudice only if the error is of "a special category of forfeited errors that can be corrected regardless of their affect on outcome" or is an error "that should be presumed prejudicial." *Id.* After determining that a forfeited error is plain and affects substantial rights, a court of appeals should exercise its discretion to correct the error if the error "seriously affect[s] the fairness, integrity or public reputation of

judicial proceedings." *Id.* at 1779 (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)).

Although this Court in *Olano* declined to address which errors can be corrected regardless of their effect on outcome, the Court indicated that the harmless error review conducted in *Arizona v. Fulimante*, 499 U.S. 279 (1990) is relevant to defining this category of errors. 113 S. Ct. at 1778. In *Fulimante*, this Court distinguished between trial errors, which must be assessed quantitatively in order to determine whether they were harmless, and structural errors, which may not be regarded as harmless. 499 U.S. at 307-10. Constitutional errors which are structural defects, such as the denial of counsel, the denial of a public trial, or a judge who is not impartial, are errors affecting the framework of the entire trial and thus are not subject to harmless error review. *Id.* at 309-10. On the other hand, constitutional errors such as admission of a confession in violation of the Sixth Amendment, admission of hearsay in violation of the Sixth Amendment, admission of evidence in violation of the Fourth Amendment, and improper commentary on a defendant's silence at trial in violation of the Fifth Amendment, all are trial errors to be examined in the context of the entire trial. *Id.* at 307-08.

Here, there was no allegation of bias or partiality on the part of the Magistrate Judge. Thus, the judge's comment, like other errors that "intrude" upon the jury, should have been examined for its impact on the jury in the context of the trial as a whole. *See Olano*, 113 S. Ct. at 1780 (recognizing that bailiff's improper comments to jurors, pretrial publicity, federal agent's investigation into juror's conduct during trial, and presence of state troopers in courtroom all are analyzed for their prejudicial impact on jury); *United States v. Young*, 470 U.S. 1, 16 (1985) (when reviewed for plain error, prosecutor's improper comments are analyzed for prejudice in light of entire record). Although the majority in this case characterized the judge's

comment as racially polarizing, there is no authority to suggest that such a characterization removes the comment from the scope of trial error.[1] Further, even if a comment appealing to racial or ethnic bias warranted a presumption of prejudice, the ultimate inquiry would remain whether the error affected the jury's deliberations and thereby its verdict. *Olano*, 113 S. Ct. at 1780. Clearly, the majority's reversal based merely on the "potential for prejudice" is at odds with this Court's standard for plain error review articulated in *Olano* and prior cases.

II. The Petition Ought To Be Granted In Order To Remedy The Divergence Of The Courts Of Appeals And Provide Guidance For Uniform Interpretation And Application Of Plain Error Review Under The Federal Rules.

The majority opinion in this civil appeal applied a standard of plain error review more lenient than the stringent standard set forth in *Olano*, a criminal proceeding. Other courts of appeals, however, have taken the position that plain error review should be more limited in the civil context than in criminal cases. Indeed, the Ninth Circuit refuses even to recognize a plain error exception to Fed. R. Civ. P. 51. *See Glover v. BIC Corp.*, 6 F.3d 1318, 1326 (9th Cir. 1993); *Hammer v. Gross*, 932 F.2d 842, 847 (9th Cir.), *cert. denied*, 502 U.S. 980 (1991). Other courts undertaking plain error review in civil matters since *Olano* have adhered to a standard at least as stringent as the one in that case. *See Highlands Insurance Co. v. National Union Fire Ins. Co.*, 27 F.3d 1027, 1032 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 903 (1995); *Smith v. Gulf Oil Co.*, 995 F.2d 638, 646 (6th Cir. 1993)

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[1] *Cf. United States v. Blake*, 941 F.2d 334, 342 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 596 (1992), where the court analyzed for prejudice to a Jamaican defendant a federal agent's testimony that he was assigned to a Jamaican drug task force, and concluded the "one word Jamaican spoken in over two days of witness testimony" did not amount to plain error.

("the principles and decision enunuciated in *Olano* apply a fortiori in the civil context where courts pay less strict attention to procedural protocol"); *see also Angelo v. Armstrong World Indus., Inc.*, 11 F.3d 957, 961 (10th Cir. 1993). And yet other courts have applied plain error review in civil matters without referring at all to *Olano*, focusing on the exceptionally narrow circumstances under which they will exercise their discretion to reverse for plain error, without first addressing any threshold standard that, if met, authorizes them to exercise that discretion. *See Aves v. Shah*, 997 F.2d 762, 765 (10th Cir. 1993); *Metromedia Co. v. Fugazy*, 983 F.2d 350, 363 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2445 (1993); *see also Champagne v. United States*, 40 F.3d 946, 947 (8th Cir. 1994).

Not only are the courts of appeals without direction concerning the extent to which *Olano* applies in the civil context, but also, assuming arguendo that *Olano* does apply, the courts are on their own to determine on a case-by-case basis whether the prejudice inquiry is the proper one. *See, e.g., United States v. Antar*, 53 F.3d 568, 573 & n.7 (3d Cir. 1995); *United States v. Whiting*, 28 F.3d 1296, 1309 (1st Cir. 1994); *United States v. Cole*, 27 F.3d 996, 999-1001 (4th Cir. 1994); *United States v. Davis*, 15 F.3d 1393, 1408, 1410 (7th Cir.), *cert. denied*, 115 S. Ct. 250 (1994). Such ad hoc application of plain error review under the federal rules is inconsistent with *Olano*'s broader goal of clarifying plain error review. *See* Jeffrey L. Lowry, Clarifying Plain Error Analysis Under Rule 52(b) of the Federal Rules of Civil Procedure, 84 *Journal of Criminal Law & Criminology* 1065, 1083-85 (1994). This Court's guidance is needed, as the appellate courts—now fully aware of *Olano* and of each other's subsequent plain error interpretations—are not likely to reconcile their own divergence, nor is this a standard prone to clarification by congressional action. *Cf. Braxton v. United States*, 500 U.S. 344, 347-48 (1991). This Court should be the one to set the standard for plain error review under the Federal Rules so that it

may be applied uniformly. *See, e.g., Business Guides Inc. v. Chromatic Communications Ent., Inc.*, 498 U.S. 533, 540-42 (1991) (interpreting standard of reasonable inquiry under Fed. R. Civ. P. 11).

The same public policies that support the standard set forth in *Olano* also support application of a uniform standard of plain error review at least as narrow, if not more so, in the civil context. Stricter review removes any incentive for attorneys to withhold objections deliberately. An absence of any objection precludes any opportunity for the trial court to issue cautionary instructions, clarify its statements, or declare a mistrial. Also, a strict standard for plain error reversal preserves respect for procedural rules. Adhering to a strict standard for reversal in such circumstances promotes orderliness and finality of judgments, recognizing that district courts are not entry gates but are the "main event." *See Highlands*, 27 F.3d at 1032. As this Court has stated previously, "[a]ny unwarranted extension of [the] exacting definition of plain error would skew the Rule[s'] careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed." *United States v. Young*, 470 U.S. 1, 15-16 (1985) (quoting *United States v. Frady*, 456 U.S. 152, 163 n.14 (1982)). Indeed, allowing the majority opinion to stand in this case will promote precisely the type of overreaching review that this Court criticized in *Young*, that is, by injecting a per se prejudice standard into plain error review in this context, the courts will continue to overstep their authority by reversing for what amount to "harmless plain errors." *See id.* at 16 n.14. This concern is magnified where there is no balancing of safeguards for the criminally accused, or even of a safeguard against errors of constitutional magnitude. Accordingly, this Court should resolve the question presented herein.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-3585

Timothy Rush,
Appellant,

v.

James Smith, Silas Hardison, David Robbins,
James Conway, Rita Krapf, Nesby Moore,
Vincent Schoemehl,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

[Submitted: April 13, 1995]
[Filed: June 5, 1995]

Before RICHARD S. ARNOLD, Chief Judge, and McMILLIAN, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, LOKEN, HANSEN, MORRIS SHEPPARD ARNOLD, and MURPHY, Circuit Judges, En Banc.

McMILLIAN, Circuit Judge.

Timothy Rush appeals from a final order entered in the district court for the Eastern District of Missouri denying his post-trial motions for a new trial or default judgment in this civil rights action brought under 42 U.S.C. § 1983. For reversal, Rush argues the trial judge erred in (1) dismissing the sole African-American juror, (2) making prejudicial comments to the jury, (3) denying his motions for new trial and default judgment based on defendants' abuse of discovery, and (4) denying his motion for new trial based on the grounds that the verdict was against the clear weight of the evidence. A panel of this court affirmed the judgment of the district court. This court subse-

quently granted rehearing en banc and vacated the panel's opinion. We now reverse and remand this case to the district court for a new trial.

I. BACKGROUND

Rush, who is African-American, filed this civil rights action claiming that two police officers used excessive force against him. After an eight-day trial, running from February 22 through March 3, 1993, a jury returned a verdict for defendants, St. Louis police officers and the St. Louis Board of Police Commissioners, on Rush's excessive force claim. Resolution of this matter required the jury to choose between two conflicting accounts of what happened during the early morning hours of January 1, 1990. Rush claimed that around the time of the incident, 12:37 a.m., he was in his home with his grandmother and his cousin. Meanwhile, a friend, Michael Mayhorn, was in Rush's backyard, celebrating the New Year by firing a shotgun into the air. Rush's grandmother asked Rush to tell Mayhorn to stop firing the shotgun and to come inside. Rush approached the kitchen door, wearing only pajama bottoms, to ask Mayhorn to cease firing the shotgun. Rush testified that while standing sideways, bent over between the storm door and the wooden door, and looking into the backyard, he was shot in the abdomen by one of the police officers. Immediately after being shot, Rush made his way to a telephone in the hallway of his home and called 911 for assistance. The testimony of Rush's grandmother and his cousin corroborated Rush's version of the facts.

The two police officers told a different story. They were dispatched to Rush's neighborhood in response to a report that shots had been fired. They claim that they were fired upon by a shotgun as they approached Rush's backyard. They saw two men standing below the steps at the rear of the home. At trial, neither officer could identify Rush as having been one of the two men. Both officers did testify that the man firing the shotgun was wearing pants and a shirt. Officer Smith claimed that 25 to 31

shotgun blasts were fired at them and that the officers returned 13 to 16 shots before notifying the dispatcher of the situation. Smith testified that after he fired two shots, his first target slumped over, handed the shotgun to the other man, and entered the house by climbing the rear steps.

Rush was indicted in connection with this incident on state charges of first degree assault, armed criminal action, and unlawful use of a weapon. However, these charges were later dropped. Robert Craddick, and assistant circuit attorney for the city, testified the he explained to Smith that the pattern of the bullet holes made by the officers' weapons and other physical evidence revealed inconsistencies in Smith's version of the incident. Upon hearing this explanation of the weaknesses in the case, Smith offered to change his account and even admitted that Rush could have been inside the house when shot. After the memorandum of *nolle prosequi* was submitted on all charges, Smith tried to convince Craddick to reinstate the charges because he feared that he would be sued if Rush was not prosecuted.

Before trial, Rush presented defendants with a discovery request for production of documents concerning prior firearms training provided to St. Louis police officers, including defendant Smith. Defendants responded that they had no documents concerning the annual firearms qualification program as it was when Smith graduated from the police academy or concerning changes in the program since that time; that Smith had not attended any in-service firearms courses other than annual qualifications since graduating from the academy because such courses did not exist; and that they objected to requests for all proposals or requests presented to the Board of Police Commissioners concerning the provision of firearms training to St. Louis police officers and for all complaints where it was alleged that a St. Louis police officer had misused firearms or wrongfully shot at an individual. Among documents produced by defendants was a Police Department Special Order providing for an admin-

istrative investigation and report (ARTS report) regarding every incident in which an officer discharges a firearm, an annual shots fired report, and establishing a firearms review committee.

Rush then presented defendants with a second discovery request for production of documents, requesting production of the ARTS report on the incident at issue, all ARTS reports prepared pursuant to the Special Order, all annual shots fired reports, and all firearms review committee reports and recommendations. Defendants objected to the request for the ARTS reports and for the shots fired reports as burdensome.

Rush then filed a motion to compel discovery of the documents not produced by defendants, and on February 11, 1993, there was a hearing on the motion. After the hearing, the trial judge ordered defendants to produce any documents showing purchases of firearms training equipment, any documents regarding firearms training proposals rejected during the previous seven years, and any information regarding the use or misuse of firearms by police officers. In addition, the trial judge ordered the Board of Police Commissioners to designate competent witnesses for deposition on this subject. Defendants produced documents regarding the purchase of a firearms simulator, but no documents concerning a 1992 firearms study, no ARTS reports, and no other documents concerning the use of firearms. The Board of Police Commissioners provided a list of potential witnesses for deposition.

On the first day of trial, February 22, 1993, Rush moved for default judgment based on allegations that defendants failed to comply with discovery orders; the motion was denied. On the third day of trial, defendants provided Rush with documents constituting the underlying materials for a study concerning police use of firearms conducted by the police department in 1992. On February 25, Rush again moved for default judgment; again, the motion was denied.

On the fourth day of trial, there was a severe snowstorm in St. Louis, resulting in ten to fourteen inches of snow on the ground by morning. Dorothy Mae Bluett, the only African-American juror, advised the trial judge's staff that she would not appear that day due to the weather. Before the trial judge's arrival at the courthouse, Rush's counsel asked a United States marshal to pick Bluett up in his car. The marshal agreed, and was in fact en route, when the trial judge called him back because only a "skeleton staff" was present in the court building that day. When the trial judge arrived at court, he told Rush's counsel that he would continue the trial with the jurors present because he had an alternate to replace Bluett and that it was too late to try to get Bluett to attend. Rush's counsel asked the trial judge's permission to send a taxicab for Bluett, but the trial judge denied the request. In his order denying the motion for new trial, the judge indicated that he had problems with a party providing transportation for a juror.

After the trial judge concluded that the trial would proceed without Bluett, the jury was brought into the courtroom. The trial judge then explained her absence to the jury as follows:

> Your eyeballs will indicate that your Juror Number Two is absent and we've previously discussed that, so we're going to proceed without her. Something just occurred to me, though, when I was being mildly scolded by the Plaintiff's attorneys for starting court late, that it was this Court's insistence that we have a black juror in this case, that put the black juror to the missing juror, Dorothy Mae Bluett in the box. I told all of you and I'm going to say this in front of the jury, it doesn't make any difference. It's a truth and I'm not afraid of the truth, but I was sincerely afraid of striking the only two blacks that were on that jury, the Court of Appeals would look askance at anybody being able to single out a particular race and eliminating them from consideration of this jury, so I, and I'm gonna take credit for

> this, I'm sorry. I've got to, I've got to preserve the justice and pursuit of justice by this Court, prevailed upon the City to put at least one of those black ladies on this panel so that Mr. Rush would be at least represented ethnic-wise or race-wise. I just, I'm not a damn fool. I haven't been around here for seventy-six years and not found out that the races have a tendency to stick together and that may be good or bad, but whatever it is, it exists.

IV Trial Tr. at 19. After the trial judge completed his remarks to the jury, counsel approached the bench:

> MR. DICK [Counsel for Rush]: . . . I know the Court's intention is good, but I would just, I think what was said might give the impression that the City was the one who graciously put a black juror on.
>
> THE COURT: I put the black juror on. I said, "I did it." I asked the attorneys to do it. I didn't say which one.
>
> . . . .
>
> MR. SINGER [Counsel for Rush]: I thought the City gracious, — I thou(ght you used the term that the City graciously agreed and maybe I'm mistaken, Judge but, —
>
> THE COURT: Well, I'll clear it up if I did.
>
> MR. SINGER: Well, now Judge, I think that'll only emphasize what was done.
>
> THE COURT: Well, what do you want me to do?
>
> MR. SINGER: Well, I mean, I'd like to go on and try this case. If your Honor thinks he can correct the measure without any further emphasis, —
>
> THE COURT: Okay, let's go.
>
> MR. SINGER: --then I would agree to do it, but, —

> Okay. The first witness, we had asked the City to produce Mr. Scott.

IV Trial Tr. at 20-21.

II. DISCUSSION

In order to maintain the integrity of our judicial system, as established by the Constitution, we, the members of the judiciary, must constantly subject ourselves to rigorous examination. When the conduct of a judge interferes with the fundamental fairness of a proceeding and substantially affects the rights of a party, it is our duty to eliminate to the extent possible, the consequences of such aberrant behavior. Because we conclude that the trial judge's remarks about racial solidarity constituted plain error, we reverse and remand the case for a new trial.[1]

Even the brief summary of the record we have provided clearly demonstrates the critical importance of the jury's assessment of witness credibility in the present case. As in all cases, the trial judge in the present case had a duty to maintain an atmosphere free from prejudicial comment. A prejudicial comment from the bench is worse than all others because it has the air of official sanction. For this reason, courts have long recognized that judges must be especially careful when making

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[1] This is a troubling case on a number of fronts. Because we find the issue regarding the trial judge's comments to the jury to be dispositive, we will not address the other issues at length. We are, however, dismayed not only by the trial judge's comments about racial solidarity, but also by the conduct of defendants during pre-trial discovery, and the way in which the trial judge removed the sole African-American juror from the jury. The defendants flouted not only our liberal discovery rules but also the district court's order compelling production of documents. There is no excuse for such obstructionist tactics. With regard to the juror dismissal, we appreciate the trial judge's desire to move the case forward; we note, however, that a reasonable delay in the interest of the ultimate goal of justice is often the most prudent choice.

comments before a jury. "A trial judge must be especially cautious and circumspect in language and conduct during a jury trial. The judge must be fair to all parties and not do or say anything that might prejudice either litigant in the eyes of the jury." *Coast-to-Coast Stores v. Womack-Bowers*, 818 F.2d 1398, 1401 (8th Cir. 1987). This admonition reflects the vital role that the trial judge plays in a jury trial. More than a century ago, the Supreme Court explained the need for an exacting standard of judicial conduct: "It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his [or her] lightest word or intimation is received with deference, and may prove controlling." *Starr v. United States*, 153 U.S. 614, 626 (1894). More recently, the Fifth Circuit reiterated this need for exemplary comportment: "By reason of his [or her] role, quickly observed by jurors, the judge is a figure of over-powering influence, whose every change in facial expression is noted, and whose every word is received attentively and acted upon with alacrity and without question." *Travelers Ins. Co. v. Ryan*, 416 F.2d 362, 364 (5th Cir. 1969). The conduct of the trial judge in the present case simply does not meet these appropriately high standards.

Because there is some question as to whether Rush's counsel lodged a timely objection to the trial judge's comments, we assume, for purposes of analysis, that a contemporaneous objection was not made. When the complaining party has failed to object to the court's statements at trial, our review is for plain error only. *Cowens v. Siemens-Elema AB*, 837 F.2d 817, 823 (8th Cir. 1988). Under plain error review, an error not identified by a contemporaneous objection is grounds for reversal only if the error prejudices the substantial rights of a party and would result in a miscarriage of justice if left uncorrected. *Fleming v. Harris*, 39 F.3d 905, 908 (8th Cir. 1994). Moreover, when faced with an allegation of judicial misconduct, "[a]n appellate court should be slow to reverse a case for the alleged misconduct of the

trial court, unless it appears that the conduct complained of was intended or calculated to disparage [a party] in the eyes of the jury and to prevent the jury from exercising an impartial judgement upon the merits."[2] *La Barge Water Well Supply Co. v. United States*, 325 F.2d 798, 802 (8th Cir. 1963) (Blackmun, J.), *citing Goldstein v. United States*, 63 F.2d 609, 613 (8th Cir. 1933). While this court previously stated that a few improper comments are not necessarily enough to require reversal, we also recognized at the same time that each case of allegedly prejudicial comments made by the trial judge "must turn on its own circumstances." *United States v. Singer*, 710 F.2d 432, 436 (8th Cir. 1983) (en banc).

There is certainly a distinction to be drawn between cases of excessive judicial intervention in the questioning of witnesses, and cases in which a trial judge makes comments in the presence of the jury that appeal to bias or prejudice. There can be no doubt that the latter sort of judicial misconduct is a more potent contaminant. Aggressive questioning by the trial judge may, in some instances, actually benefit the truth-seeking function of the courts, though such active participation is not favored. Further, it is quite possible that a trial judge may be able to engage in such questioning without revealing his or her views on the merits of the case. However, when the trial judge's role loses it impartial character and tends to emphasize and accentuate one side's case over another's, a trial judge's participation becomes prejudicial and may require reversal. *See United States v. Bland*, 697 F.2d 262, 265 (8th Cir. 1983). The difference between this type of impropriety and the impropriety of comments which appeal to bias or racial prejudice is not one of degree, but of kind. Comments which appeal to such passions can never serve a salutary purpose. Even one instance of such comment, depend-

[2] This restatement of our approach to claims of judicial misconduct corrects the alteration of a quotation from *La Barge Water Well Supply Co. V. United States*, 325 F.2d 798, 802 (8th Cir. 1963), found in *Harris v. Steelweld Equip. Co.*, 869 F.2d 396, 400 (8th Cir.), *cert. denied*, 493 U.S. 817 (1989).

ing of the facts and circumstances of the case, may be sufficient to destroy the integrity of the entire proceeding. Outrageous comments of this sort will be exceedingly rare, but they unfortunately occur from time to time. This case is one such incident.

Before addressing the impropriety of the trial judge's comments on racial solidarity, we first note that the trial judge should not have told the jury that Rush's attorneys "scolded" him for being late. The trial judge should have refrained from making such a reference because of the danger that such characterization might unfairly disparage Rush and his counsel in the eyes of the jury. Most importantly, the trial judge committed plain error by telling the jury that the races have a tendency to stick together. All the trial judge had to do was tell the jury that a juror was unable to attend and that an alternate would take her place.

While the trial judge's improper comments were not directed at the merits of Rush's case, our concern is that they might have effectively undermined the credibility of his corroborating witnesses. The potential for prejudice created by the utterance of the trial judge's racially polarizing remark to an all-white jury hearing a civil rights case brought by an African-American most of whose corroborating witnesses were also African-American is self-evident. A similar case was considered by a New York state appeals court over thirty years ago in *People v. Burris*, 241 N.Y.S.2d 75 (App. Div. 1963) (*Burris*). That court's appreciation of the inequity of weighing testimony on the basis of racial similarity is instructive:

> In our opinion, the defendant did not receive a fair trial. Both the court and the assistant district attorney suggested to the jury that the identification of the defendant by the complaining witness should be weighed in the light of the fact that both defendant and the witness were negroes. We have firmly rejected the weighing of testimony on the basis of racial similarity or dissimilarity of witnesses. As identification here turned on the testimony of a single witness,

> a new trial is necessary to correct the possible effect on the jury of an argument which should be eschewed as false in its premise and divisive in its results.

Id. (citation omitted). The wisdom of that court's decision is compelling. While the trial judge in the present case did not expressly state that Rush's witnesses should be discredited, we believe that the danger of his implication demands a new trial as well. Even an inadvertent and indirect suggestion that Rush and his corroborating witnesses gave a consistent account of the events because of racial solidarity, and not because of their sworn duty to tell the truth, is completely intolerable. Moreover, when such suggestion is made in a civil case, it will generally prove more damaging to the plaintiff because, on most issues, he or she has the burden of proof.

Because of the impracticality of determining what, if any, effect his racially-divisive remark had on the jury in the present case, to require a showing of actual prejudice would be tantamount to declaring such egregious comments unreviewable. We return therefore to the result in *Burris*. In that case, the court realized the importance of witness credibility and therefore determined that the "possible effect" on the jury was sufficient to merit a new trial. On the particular facts of this case, we hold that the potential for prejudice in the minds of the jurors was so great that no specific showing of actual prejudice is required.[3]

III. CONCLUSION

Because we believe that the trial judge's comments in this case substantially affected Rush's right to a fair trial, we reverse and remand this case to the district court for a new trial.

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[3] In *United States v. Olano*, 113 S. Ct. 1770, 1778 (1993), the Supreme Court, while discussing the definition of plain error in the context of a criminal matter, recognized there may be forfeited errors that can be corrected on appeal regardless of their effect on the outcome. Further, the Court declined to address "those errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice." *Id.*

HANSEN, Circuit Judge, concurring specially.

I agree with most all of the court's opinion and I readily concur in its judgement. I believe that the court is correct in finding plain error, but I write separately because I do not believe a "possible effect" on the jury or the "potential for prejudice," *ante.* at 10, is sufficient as a matter of current law to support a plain error reversal. As we have very recently observed, for there "to be plain error in a civil case, [the error] must have '*almost surely* affected the outcome of the case.'" *Champagne v. United States*, 40 F.2d 946, 947 (8th Cir. 1994) (quoting *Angelo v. Armstrong World Indus., Inc.*, 11 F.3d 957, 961 (10th Cir. 1993)) (other quotation omitted) (emphasis added). Similarly, the criminal cases interpreting the Supreme Court's most recent elucidation of the plain error standard (applying Fed. R. Crim. P. 52(b)) in *Olano*, indicate that a "possible effect" or "potential for prejudice" is insufficient to establish plain error. *See, e.g., United States v. Turcks*, 41 F.3d 893, 898 (3d Cir. 1994) (under *Olano* to establish "prejudice" requirement defendant must "show that the outcome of his trial was *actually affected*") (emphasis added); *United States v. Miro*, 29 F.3d 194, 200 (5th Cir. 1994) (under *Olano* in normal case defendant must show "*actual prejudice*") (emphasis added); *United States v. Ullyses-Salazar*, 28 F.3d. 932, 938 (9th Cir. 1994) (plain error requires "*highly prejudicial* error" affecting substantial rights) (emphasis added).

I would conclude that the trial judge's comments here constituted plain error by finding that those comments give rise to a rebuttable presumption of prejudice. The Supreme Court specifically observed in *Olano* that there may be a category of cases where otherwise forfeited errors could be corrected regardless of their effect on the trial's outcome, or that there exists a category of errors that are presumed prejudicial even if the defendant cannot make a specific showing of prejudice. 113 S. Ct. at 1178. As our court's opinion notes, *ante.* at 11, n.3, the Supreme Court did not address the nature of the errors that fall into those

categories. In my view, the egregious and unprecedented comments made by the trial judge in this case are precisely the type of error that should be considered presumptively prejudicial.

Our court's opinion has thoughtfully and thoroughly explained the inherent danger of the trial judge's remarks here given the uniquely influential role of the trial judge coupled with the racially polarizing nature of the comments made to an all-white jury in a case brought by an African-American, most of whose key witnesses also were African-American. I would further add that a critical function of a trial judge is to ensure that the very type of highly inappropriate and irrelevant racially charged commentary involved in this case gets no play before the jury. The fact that the trial court itself, by its own comments, failed in this critical function troubles me deeply.

I too believe the risk of prejudice in a case like this is unacceptably high. I would conclude that in exceptionally rare cases, like this, where the trial judge makes racially oriented comments which tend to separate the trial's participants including the jury itself along racial lines, a rebuttable presumption of prejudice is warranted. *See generally United States v. Doe*, 903 F.2d 16, 25 (D.C. Cir. 1990) ("Racial fairness of the trial is an indispensable ingredient of due process and racial equality a hallmark of justice"). The rare nature of the cases falling into this category makes them amenable to a presumption of prejudice because the category, by its very nature, would be very limited and easily definable.

As indicated, I would apply a rebuttable presumption of prejudice to this case. After reviewing the record, however, I find that not one of the arguments made by the defendants is sufficient to rebut the presumption. Accordingly, like our court, I would find plain error and would exercise our remedial discretion to reverse for a new trial because the error in this case strikes at the heart of the "integrity or public reputation of judicial

proceedings." *Olano*, 113 S. Ct. at 1779 (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)).

MAGILL, Circuit Judge, with whom BOWMAN and MORRIS SHEPPARD ARNOLD, Circuit Judges, join, dissenting.

The majority's opinion neglects to apply plain error review as delineated by the Supreme Court, overstepping the authority of this Court. We respectfully dissent.

Despite the majority's reluctance to make a finding, it is quite clear that Rush's counsel made no objection, express or implied, to the comment at issue in this case. Any implied objection by Rush's counsel was not to this comment, but to a different statement by the court. The exchange quoted at page six of the majority's opinion reveals that, if any objection at all was made by defense counsel, it was made in reference to the court's characterization of the circumstances of Bleuett's seating on the jury, not to the court's statement about racial solidarity. The court's comment was never mentioned or referred to in the above exchange, and, when Singer said "if your Honor thinks he can correct the measure without any further emphasis," he was discussing the issue of who requested Bleuett's seating, not the court's comment regarding racial solidarity.

I. PLAIN ERROR STANDARD

Because there was no objection, express or implied, to the comment regarding racial solidarity, this Court must review the court's comment for plain error. *Cowens v. Siemens-Elema AB*, 837 F.2d 817, 823 (8th Cir. 1988). Plain error is a stringently limited standard of review, particularly in the civil context. It is a judicially-created exception to Rule 51 of the Federal Rules of Civil Procedure, which are binding on our court. We have no discretion to correct forfeited errors to which no objection was made unless they meet the plain error standard: "The forfeited error 'may be noticed' only if it is 'plain' and 'affect[s] substan-

tial rights.' More precisely, the Court of Appeals may *correct* the error . . . only if it meets these criteria." *United States v. Olano*, 113 S. Ct. 1770, 1777 (1993) (quoting Federal Rule of Criminal Procedure 52(b)). The Supreme Court recently clarified the standard for plain error review under Federal Rule of Criminal Procedure 52(b) (the more lenient criminal analogue to Rule 51). *Id.* at 1776. The Fifth Circuit has commented that:

> Federal Rule of Civil Procedure 51 is even more restrictive than Criminal Rule 52(b); indeed, [the Ninth Circuit] holds that it allows no new attacks on instructions on appeal. We thus agree with the Sixth Circuit that '[t]he principles and decision enunciated in *Olano* apply *a fortiori* in the civil context where courts pay less strict attention to procedural protocol.' *Olano* augments this court's long-standing rule that reversal for plain error is 'not a run-of-the-mill remedy' and will occur 'only in exceptional circumstances to avoid a miscarriage of justice.'

Highlands Ins. v. National Union Fire Ins., 27 F.d. 1027, 1032 (5th Cir. 1994). *cert. denied*, 115 S. Ct. 903 (1995).

Olano sets out in detail three limitations on the Courts of Appeals' authority to correct forfeited errors. First, there must be an error. *Olano*, 113 S. Ct. At 1777. An error consists of deviation from a legal rule, unless that rule has been waived. *Id.* Waiver extinguishes any error derived from the waived legal rule; failure to object, forfeiture, does not extinguish the error, but limits the right to correction of that error on appeal. *See id.* Here there was no waiver, and the comment was improper; there was therefore error.

Second, the error must be "plain," which is "synonymous with 'clear' or, equivalently, 'obvious.'" *Id.* We assume arguendo that the error in this case was plain, although the fact that counsel did not object to the comment when made is an indication that the error may not have been as plain as the majority seems to believe.

Third, the error must "affect substantial rights." *Id.* at 1777-78. In general, substantial rights are not affected unless a showing of prejudice is made. "[T]he error must have been prejudicial: It must have affected the outcome of the District Court proceedings." *Id.* at 1778. The prejudice analysis in the plain error context is similar to a harmless error inquiry, "with one important difference:" In plain error review, the party claiming error bears the burden of showing that the error was prejudicial.[1] *See id.* Rush, therefore, as the party claiming plain error in this case, bears the burden of showing specific prejudice to meet the third prong of the plain error standard.

The Supreme Court has recognized only two possible exceptions to the plain error requirement that specific prejudice resulted from a forfeited error: There "may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome,"[2] and there may be errors "that should be

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[1] In *United States v. Young*, 470 U.S. 1 (1984), cited in *Olano*, 113 S. Ct. at 1776-77, the Court explained the dangers of failing to require a showing of prejudice in plain error review:

> A *per se* approach to plain-error review is flawed. . . [F]ederal courts have consistently interpreted the plain-error doctrine as requiring an appellate court to find that the claimed error not only seriously affected 'substantial rights,' but that it had an unfair prejudicial impact on the jury's deliberations. . . . To do otherwise could well lead to having appellate courts indulge in the pointless exercise of reviewing 'harmless plain errors' --a practice that is contrary to the draftsmen's intention behind Rule 52(b), and one that courts have studiously avoided and commentators have properly criticized."

Young, 470 U.S. at 16-17 n.14 (internal citations omitted).

[2] Confusingly, the Court has sometimes referred to such errors as ones in which a "presumption of prejudice" is applied, *see Penson v. Ohio*, 488 U.S. 75, 87 (1988), but in *Olano*, the Court used the phrase "presumed prejudice" to refer to a finding of prejudice derived from a threshold showing that a high risk of prejudice was present in the circumstances of the specific case. *See Olano*, 113 S. Ct. at 1781.

presumed prejudicial if [the party claiming error] cannot make a specific showing of prejudice." *Id.* Nevertheless, "[n]ormally . . . the [party claiming error] must make a specific showing of prejudice to satisfy the 'affecting substantial rights' prong . . . ." *Id.*

Finally, once the three threshold requirements of the plain error standard have been met, the court has discretion to correct the forfeited error. *Id.* The court should exercise this discretion only when "a miscarriage of justice would otherwise result." *Id.* At 1779 (quoting *Young*, 470 U.S. at 15). In the plain error context, a miscarriage of justice has occurred when an error has "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Id.* (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)). This test is applied only after it has been established that the forfeited error affected substantial rights: "If the forfeited error is 'plain' and 'affect[s] substantial rights,' the Court of Appeals has authority to order correction, but is not required to do so." *Id.* at 1778.

Under the Supreme Court's plain error analysis, therefore, Rush, as the party claiming plain error, bears the burden of showing specific prejudice to meet the third prong of the plain error standard, unless he can show that the error was of the special category of forfeited errors that can be corrected regardless of effect on outcome, or that prejudice should be presumed.

II. ERROR THAT CAN BE CORRECTED REGARDLESS OF EFFECT ON OUTCOME

This Court has never treated improper judicial commentary during trial as error of the special category that can be corrected regardless of effect on outcome. In *Goldstein v. United States*, 63 F.2d 609 (8th Cir. 1933), this Court stated that "[t]he question which we are called upon to decide is whether these remarks during the progress of the trial were actually prejudicial to the defendant," *id.* At 613. This requirement of prejudice for plain

error in the improper commentary context has been reaffirmed by this Court repeatedly since *Goldstein*. *See LaBarge Water Well Supply Co. v. United States*, 325 F.2d 798, 802 (8th Cir. 1963) ("we must nevertheless conclude that [judicial commentary] prejudiced the defendant before a new trial may be ordered on such grounds"); *United States v. Porter*, 441 F.2d 1204, 1215 (8th Cir.) ("we determine that as to each of the defendants there was not sufficient prejudice [resulting from judicial commentary] to require reversal"), *cert. denied*, 404 U.S. 911 (1971); *and Harris v. Steelweld Equip. Co.*, 869 F.2d 396, 400 (8th Cir.) ("it must also be shown 'that [judicial commentary] prejudiced the defendant before a new trial may be ordered on such grounds'"), *cert. denied*, 493 U.S. 817 (1989).

The recent harmless error jurisprudence of the Supreme Court, involving the direct criminal appeal of admission of a forced confession, strongly suggests that we should not venture to change this long-standing rule. In *Arizona v. Fulminante*, 499 U.S. 279 (1990), cited in *Olano* as pertinent to the limits of the prejudice requirement in plain error review, 113 S. Ct. at 1778, the Court held that harmless error review applies to confessions obtained in violation of the Sixth Amendment, and delineated the distinction between constitutional violations susceptible to harmless error review and violations that are grounds for reversal regardless of impact on the outcome of the trial. *Fulminante*, 499 U.S. at 306- 12. The Court listed examples of errors that are subject to harmless error review, among which were admission of a confession in violation of the Sixth Amendment, use of incorrect jury instructions, commentary regarding defendants' silence in violation of the Fifth Amendment, admission of identification evidence or hearsay in violation of the Sixth Amendment, and admission of evidence obtained in violation of the Fourth Amendment. *Id.* At 306-07. The Court found that:

> The common thread connecting these cases is that each involved "trial error" — error which occurred during the

> presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.

Id. At 307-08. Constitutional violations that are not subject to harmless error review, such as denial of the right to counsel or trial before a judge financially interested in the outcome of the case, differ from trial errors in that they intrinsically affect the entire trial:

> These are structural defects in the constitution of the trial mechanism, which defy analysis by "harmless- error" standards. The entire conduct of the trial from beginning to end is obviously affected by the absence of counsel for a criminal defendant, just as it is by the presence on the bench of a judge who is not impartial. Since our decision in *Chapman*, other cases have added to the category of constitutional errors which are not subject to harmless error the following: unlawful exclusion of members of the defendant's race from a grand jury; the right to self-representation at trial; and the right to public trial. Each of these constitutional deprivations is a similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.

Id. At 309-10 (citations omitted). It is clear that inappropriate commentary by a judge, whatever the specific source of the impropriety, is not a structural defect affecting the framework within which the trial proceeds, but simple "trial error."[3] Like the improper admission of a confession or a hearsay statement, or the giving of incorrect jury instructions, a judge's commentary does not affect the framework of the trial from start to finish; it is an

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[3] There is no allegation that the judge in the instant case was actually biased or lacked impartiality.

erroneous element within the trial that may or may not have affected the trial as a whole. The structural errors listed above all involve the ongoing and internal corruption of an essential element of a trial—judge, jury, advocacy, publicness--as mandated by the Constitution. Inappropriate judicial commentary consists of isolated additions to the information provided to the jury at trial, just as improperly admitted evidence does, and such additions are, unlike structural errors, susceptible to an examination of their impact in the context of the trial as a whole.

In an attempt to justify its failure to apply the plain error standard, the majority's opinion appears to draw a distinction between comments "that appeal to bias or prejudice" and "excessive judicial intervention in the questioning of witnesses," stating that the difference between these two types of impropriety "is not one of degree, but of kind" because commentary that appeals to "bias or racial prejudice" can never serve a salutary purpose, as can intervention in questioning, and because intervention need not reveal the judge's views on the merits of the case. Maj. op. at 9. It is not quite clear to us whether this distinction draws a line between racial comments and all other judicial comments or between judicial comments and judicial intervention regardless of racial content, but it appears to us that the intention is to separate racial comments from others. This distinction fails to address comments, such as the one in *Hale v. Firestone Tire & Rubber Co.*, 756 F.2d 1322 (8th Cir. 1985), that are neither potentially constructive intervention nor related to race. In *Hale*, the judge said, in a products liability case, that he had "put air in a lot of tires, but never had one blow up on [him]." *Id.* At 1330. This comment was found not to have been error warranting reversal, despite the fact that it directly indicated a preference for the plaintiff over the defendant, and clearly served no salutary purpose.

Although characterized by the majority as a comment appealing to racial bias, the comment that "races tend to stick together" does not indicate a preference for one party over another nor, for that matter, does it indicate a preference for one race over

another. Made in the context of explaining to the jury the removal of the only black juror,[4] the comment is equally applicable to all races and, while inappropriate, cannot accurately be described as "biased" against one race or another. This comment cannot be distinguished from the comment in *Hale* as racially biased, but only as having racial content. It does not appeal to any racial prejudice latent in the jury, nor does it suggest that the judge harbors or condones such prejudice. The distinction proposed by the majority therefore must extend to all comments that include racial content if it is to distinguish this comment from comments such as the one in *Hale*. This broad distinction is unsupported by precedent[5] and runs contrary to the stringent requirements of plain error review. Further, we are unable to discern from the majority's opinion just what modifications to plain error review are proposed for review of comments with racial content. The opinion states that a showing of actual prejudice is not required, but fails to state whether no showing of prejudice is required or whether a showing that prejudice should be presumed is required, finding only that the "potential for

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[4] Incidentally, at jury selection, it was the court—at side bar — who literally importuned the prosecutor to retain this woman on the jury, ensuring that *Batson* was satisfied. I Trial Tr. 155-61.

[5] The majority cites *People v. Burris*, 241 N.Y.S.2d 75 (App. Div. 1963), in support of its apparent contention that comments with racial content should receive a relaxed version of plain error review. Not only is *Burris* more than 30 years old and a New York state case not binding on this Court, but it is also not clear that *Burris* involved facts similar to those in this case. The majority quotes the entire opinion in that case, except for a first sentence summarizing procedural history. Maj. op. at 11. The only facts of the case included are that both the court and the prosecutor "suggested to the jury that the identification of the defendant by the complaining witness should be weighed in the light of the fact that both the defendant and the witness were negroes," and that identification in the case turned on the testimony of that single witness. *Burris*, 241 N.Y.S.2d at 76. Neither of these facts applies to this case: the court never actually suggested that the jury weigh testimony of witnesses according to racial identity, and this case did not turn on the testimony of a single witness.

prejudice is so great that no specific showing of actual prejudice is required."[6] Maj. op. at 11-12. The plain error analysis

[6] We note that Judge Hansen's concurrence recognizes the method of plain error review delineated in *Olano*, but fails then to apply this method in a manner consistent with the Supreme Court's analysis. Under the *Olano* analysis, there are three separate categories of error: errors for which no showing of prejudice need be made; errors for which a showing supporting a presumption of prejudice must be made; and errors for which a showing of specific prejudice must be made. *See Olano*, 113 S. Ct. at 1778, 1779-80. Under *Olano*, the party claiming error carries the burden of showing that, on the facts of the case, there was evidence that the specific error committed created a high risk of prejudice: A finding of inherent prejudice without facts that show a high risk that prejudice resulted in the specific case does not meet the plain error requirement. *See id.* at 1781. Although the concurrence states that this error should be considered "presumptively prejudicial," it supports this contention, not with facts showing a high risk of prejudice in this case, but by citing the "inherent danger" of remarks with racial content, and stating that prejudice should be presumed in ". . . cases, like this, where the trial judge makes racially oriented comments which tend to separate the trial's participants along racial lines . . ." Concurring op. at 2. This generalized danger attributed to comments that can take place in a wide variety of specific contexts is not sufficient to meet the requirements of a threshold showing supporting presumed prejudice.

Further the concurrence describes this categorical presumption of prejudice as "rebuttable" by the defendants, citing *United States v. Doe*, 903 F.2d 16, 25 (D.C. Cir. 1990). This reverses the burden of proof as allocated in *Olano*:

> In sum, respondents have not met their burden of showing prejudice under Rule 52(b). Whether the Government could have met its burden of showing the absence of prejudice, under Rule 52(a), if respondents had not forfeited their claim of error, is not at issue here. This is a plain-error case, and it is respondents who must persuade the appellate court that the deviation from Rule 24c was prejudicial.

113 S. Ct. at 1781. The concurrence would create a presumption of prejudice applicable to an entire category of error, regardless of the specific facts of the case, and cast the burden of showing absence of prejudice on the defendants. This runs directly contrary to the mandate of *Olano*. In *Doe*, a harmless error case in which the prosecutor gave, in summation, a lengthy dissertation that

(Footnote 6 continued on next page)

mandated by the Supreme Court in *Olano*, however, requires that either actual prejudice or facts supporting a presumption of prejudice be shown by the plaintiff unless the error is one of the special category that can be corrected on appeal regardless of effect on the outcome.

This distinction argued by the majority—between comments with racial content and other improper comments—bears no relation to the distinction between trial error and structural error that the Supreme Court has determined is relevant to the determination of whether a showing of prejudice is required. Racial content does not transform a comment from trial error to structural error, and cannot support the classification of improper judicial comments in the same category as such structural corruptions as violations of the right to counsel or the right to an impartial judge.

III. SPECIFIC AND PRESUMED PREJUDICE

Because improper judicial commentary is not structural error, it cannot be error of the special category that can be corrected regardless of effect on outcome; Rush thus must show either specific prejudice or facts supporting a presumption of prejudice. In *Olano*, the Court stated that "[t]here may be cases where an intrusion [into jury deliberations] should be presumed prejudicial, but a presumption of prejudice as opposed to a specific analysis does not change the ultimate inquiry: Did the intrusion affect the jury's deliberations and thereby its verdict?" *Olano*, 113 S. Ct. at 1780 (citations omitted). Similarly, in this case, a

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Footnote 6 continued)

attributed a range of criminal activities to the entire Jamaican population of D.C., an objection was made to the summation, and the burden was on the government to show that the error was harmless. *Doe*, 903 F.2d at 23-24, 27. Under plain error review, when no objection was made, the burden is on the party claiming error; this is the reverse of harmless error analysis, in which an objection was made, and the burden is on the party claiming harmlessness.

presumption of prejudice would not change the ultimate inquiry: Did the district court's comment affect the jury's perception of the witnesses and *thereby its verdict*? This Court's recent decision in *Champagne v. United States*, 40 F.3d 946 (8th Cir. 1994), supports the application of the *Olano* requirement that the verdict be affected to civil plain error review:

> In a criminal case, our evaluation would be governed by the case law interpreting Fed.R.Crim.P. 52(b) . . . . Although there is no equivalent rule in civil procedure, the Supreme Court has described plain error in a civil case as 'obvious, or . . . otherwise seriously affect[ing] the fairness, integrity or public reputation of judicial proceedings.' Federal appellate courts have held, in addition, that for a challenged action to be plain error in a civil case, it must have "'*almost surely affected the outcome of the case.*'"

Id. at 947 (quoting *Angelo v. Armstrong World Indus., Inc.*, 11 F.3d 957, 961 (10th Cir. 1993)) (internal quotations and citations omitted) (emphasis added).

In *Olano*, the Court analyzed the claim of plain error first for "specific prejudice" and second for "presumed prejudice," finding that specific prejudice had not been shown, and, examining the facts of the specific case, that the presence of alternate jurors during jury deliberations, without more, does not create presumed prejudice. 113 S. Ct. at 1781.

Rush has not carried his burden of showing either specific prejudice or facts supporting a presumption of prejudice. As the majority points out, specific prejudice is very difficult to show in the context of erroneous judicial commentary, and Rush has made no such showing. A showing supporting presumed prejudice, however, as the Supreme Court observed, requires the party claiming error to show that the error affected the jury's verdict. *See id.* At 1780.

The majority does not examine whether Rush has carried his burden of showing facts indicating that the comment affected the verdict: The opinion merely argues that comments with racial content are "different" from other improper judicial comments and asserts that the potential for prejudice from a "racially polarizing remark" is enough to meet the requirements of plain error review. To carry the threshold burden for presumed prejudice, however, a party must provide case specific facts that support the conclusion that the jury's verdict was affected by the improper comment. *See id.* at 1780-81. A bare assertion that the comment had potential to prejudice the jury is not adequate to meet the plain error standard as delineated in *Olano*. Potential prejudice in theory is not enough; evidence that a high risk of prejudice existed under the circumstances of the case is required. Examining the facts of this case, we do not find that prejudice was likely to result from this single comment.

The majority characterizes the court's comment as "racially polarizing." In the circumstances of this case, however, the comment could not have a racially polarizing effect. Although Rush was black and the jury which remained was white, the defendants were not all white. Although the name defendant, officer Smith, was white, the defendant officer who was with him during the incident, who also fired shots at the Rush backyard, and who testified, was black. Defendant board of commissioners included several black members and several white members. Further, Rush states that all his "fact" witnesses were black: These "fact" witnesses were his grandmother and his cousin. The family relationship among Rush and his witnesses was far more likely to cause the jury to doubt their story than the fact that they were of the same race. At least one of Rush's expert witnesses was white. Thus, there were witnesses of both races testifying for both the plaintiff and the defendants, and at least some of the defendants were black. Accordingly, a statement that "races tend to stick together" does not indicate to the jury that

they should favor one version of events over the other, since there were witnesses of the jury's own race and witnesses not of the jury's own race telling each version of the story, and there were witnesses of each race corroborating each version of the story.

Furthermore, the comment was a single incident occurring halfway through an eight-day trial. *See Hale*, 756 F.2d at 1330; *Cowens*, 837 F.2d at 824. We have often held that "a few improper comments are not necessarily enough to require reversal," *see, e.g., Hale*, 75 F.2d at 1330, and have considered the weight of improper comments in the context of the length and complexity of the trial, *see id.* (court's comment in product liability case that he had "put air in a lot of tires, but [he] never had one blow up on [him]" not sufficient for reversal, because this was a minor incident in a lengthy trial); *Cowens*, 837 F.2d at 824 (comments considered in light of entire seven-volume trial transcript). In this case, a single, brief improper comment was made in the midst of an eight-day trial. The comment did not reach the merits of the case or indicate a partiality for a particular party, and was not intended to prejudice any party, but to explain to the jury the replacement of one of their colleagues. The court's observation was made on a particularly chaotic morning in the middle of a lengthy trial, and the likelihood of the jury's deriving and then retaining any implication that they should disbelieve Rush's witnesses from this single comment is low.

In addition, this Court has held that "[t]he burden is on the appellant to show both error and prejudice, and 'error which in a close case might call for a reversal may be disregarded as harmless where the evidence of guilt is strong.'" *Chubet v. United States*, 414 F.2d 1018, 1021 (8th Cir. 1969) (quoting *Thomas v. United States*, 281 F.2d 132, 136 (8th Cir.), *cert. denied*, 364 U.S. 904 (1960)) (internal citations omitted); *see Porter*, 441 F.2d at 1215 ("Errors of the trial court which may be prejudicial in a close criminal case, in the sense of being capable

in such a situation of possibly affecting the result, can well be without any such rational possibility in a strong case, and thus not entitle the defendant to a reversal of his conviction. The reviewing court must, of course, be able to say with fair assurance that the errors complained of could not, with natural operation in the total setting and proceedings had, be regarded as having possessed any influencing effect." (Quoting *Homan v. United States*, 279 F.2d 767, 771 (8th Cir.), *cert. denied*, 364 U.S. 866 (1960)); *accord August*, 745 F.2d at 406 ("The court here . . . made a specific finding that any possible prejudice that could have resulted from the remarks in question was far outweighed by substantial evidence of guilt.").

In our view, this was not a close case. As the majority states, this case turned on conflicting testimony, but the weight of the testimony was significantly in favor of the defendants. Rush's version of events was supported by only one eyewitness: his first cousin, who lived in the same house as Rush. The jury discredited her testimony that Rush spent the evening, until near-midnight, upstairs in bed, talking on the telephone. One of Rush's neighbors, Pamela Rudderforth, testified to seeing Rush running down the alley between their houses that evening at 8:45 with a shotgun. VI Trial Tr. at 32. His seventy-four year old grandmother's testimony did not contradict Rush's story, but it also did not support it. She testified that, at the time of the shooting, she was in the dining room watching television and could not see events taking place either in the kitchen or in the yard. I Trial Tr. at 203-08. She saw Rush pass through the dining room going toward the kitchen, but could not see whether he stayed in the kitchen, or went through the kitchen into the yard. In addition, officer George, a firearms expert who examined the area in which the incident took place, testified that he found sixty-five shell casings in the Rush backyard. VI Trial Tr. at 16.

Four eyewitnesses, including Smith's black partner, officer Hardison, and two of Rush's next-door neighbors[7] testified that they saw the events take place as Smith described them.[8] Rush's story was supported only by the testimony of a close relative who lived with him. The credibility of Rush's position was further undermined by the fact that jurors were informed that Rush was, at the time of trial, a felony convict and in the custody of Fulton state prison. This information was communicated to the jury panel and the two plainclothes state officers accompanying Rush were identified to jurors during voir dire. I Trial Tr. at 23, 48.

The jury's verdict for defendants reflects the low credibility of Rush's version of events and the weaknesses of Rush's evidence against defendants.

In sum, if the jury took any notice of the comment at all, given its brevity and timing, the comment applied to both parties, giving no particular indication that the jury should have believed one version of events over another. Further, the verdict for defendants was not affected because the evidence was strongly in favor of defendants, and the verdict in keeping with this evidence. We find that, on the facts of this case, Rush has not carried his burden of showing that we should presume that prejudice affecting the outcome of the trial resulted from the court's comment.

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[7] Mr. Miller, a city mechnical inspector, and Ms. Rudderforth, a certified nurse's assistant.

[8] The majority makes much of the fact that the criminal charges against Rush stemming from this incident were dropped. In a criminal prosecution against Rush, the state must carry the burden of showing, beyond a reaonable doubt, that Rush committed the crimes with which he was charged. In a civil suit against police, Rush must carry the burden of showing, by a preponderance of the evidence, that the police acted in violation of his civil rights. A feeling by the prosecutor that a criminal case against Rush only had a 50% chance of success in no way translates to an indication that Rush's § 1983 suit had a significant likelihood of success.

IV. CONCLUSION

We therefore dissent, and would affirm. Rush has not shown that the court's improper comment constituted plain error because he has not shown that the comment affected substantial rights: The error was not one that we have authority to correct regardless of its effect on the outcome of the trial; and Rush has shown neither specific prejudice nor facts supporting presumed prejudice.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-3585EMSL

Timothy Rush,
Appellant,

v.

James Smith, et al.,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

Appellant's petition for rehearing with suggestion for rehearing en banc is granted. The opinion and judgment of the court entered on January 23, 1995 are vacated.

The case is set for oral argument at 9:00 A.M. on Thursday, April 13, 1995, in the U.S. Court and Custom House in St. Louis, Missouri.

March 16, 1995

Order Entered at the Direction of the Court
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-3585

Timothy Rush,

Appellant,

v.

James Smith, Silas Hardison, David Robbins, James Conway, Rita Krapf, Nesby Moore, Vincent Schoemehl,

Appellees.

Appeal from the United States District Court for the Eastern District of Missouri

[Submitted: September 15, 1994]
[Filed: January 23, 1994]

Before McMILLIAN, and MAGILL, Circuit Judges, and BOGUE,* Senior District Judge. MAGILL, Circuit Judge.

Timothy Rush appeals the trial court's denial of his motions for a new trial and for default judgment in this civil rights action under 42 U.S.C. § 1983. Rush argues that the trial court erred by dismissing the sole black juror, by making prejudicial comments to the jury, by denying his motions for a new trial and default judgment based on defendants' abuse of discovery, and by denying his motion for a new trial on grounds that the verdict was against the weight of the evidence. We affirm.

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* THE HONORABLE ANDREW W. BOGUE, Senior United States District Judge for the District of South Dakota, sitting by designation.

I. BACKGROUND

After an eight-day trial, running from February 22 through March 3, 1993,[1] a jury returned a verdict for defendants, St. Louis police officers and the St. Louis Board of Police Commissioners, in this excessive force claim. Timothy Rush appeals the trial court's denial of his motion for a new trial, arguing that the trial was prejudiced by the dismissal of the sole black juror and by the court's comments regarding that dismissal; that discovery abuses by defendants warranted a default judgment or new trial; and that the jury verdict was manifestly unjust and against the weight of the evidence.

A. Juror Dismissal

On the fourth day of trial, February 25, there was a snowstorm in St. Louis resulting in ten to fourteen inches of snow on the ground by morning. Dorothy Bleuett, the only black juror, advised the trial court's staff that she would not appear that day due to the snow. Before the judge's arrival, plaintiff's counsel requested that a marshal pick Bleuett up in his car. The marshal agreed, but the judge indicated by telephone that the marshal was not to leave court, as only a "skeleton staff" was present that day. IV Trial Tr. at 7. When the judge arrived at court, he stated to counsel that the jurors present were the jurors who would sit, and that it was already late and "ample time to start this case." IV Trial Tr. at 7-8. Plaintiff's counsel requested permission to send a taxicab for Bleuett, but the judge denied the request on the grounds that party involvement in juror transportation was problematic, and that there was no guarantee that Bleuett would be willing to come to court even if a taxi were provided.

When the jury entered, the court explained Bleuett's absence to them:

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[1] All dates refer to 1993 unless otherwise indicated.

> I've got to preserve the justice and pursuit of justice by this Court, prevailed upon the City to put at least one of those black ladies on this panel so that Mr. Rush would be at least represented ethnic-wise or race-wise. I just, I'm not a damn fool. I haven't been around here for seventy-six years and not found out that the races have a tendency to stick together and that may be good or bad, but whatever it is, it exists.

IV Trial Tr. at 19. After the judge completed his remarks to the jury, counsel approached the bench:

> MR. DICK [Counsel for plaintiff]: . . . I know the Court's intention is good, but I would just, I think what was said might give the impression that the City was the one who graciously put a black juror on.
>
> THE COURT: I put the black juror on. I said, "I did it." I asked the attorneys to do it. I didn't say which one.
>
> . . . .
>
> MR. SINGER: [Counsel for plaintiff]: I thought the City gracious,—I thought you used the term that the City graciously agreed and maybe I'm mistaken, Judge, but,—
>
> THE COURT: Well, I'll clear it up if I did.
>
> MR. SINGER: Well, now Judge, I think that'll only emphasize what was done.
>
> THE COURT: Well, what do you want me to do?
>
> MR. SINGER: Well, I mean, I'd like to go on and try this case. If your Honor thinks he can correct the measure without any further emphasis,—
>
> THE COURT: Okay, let's go.
>
> MR. SINGER: — then I would agree to do it, but, — Okay. The first witness, we had asked the City to produce Mr. Scott.

IV Trial Tr. at 20-21.

B. Discovery

Before trial, plaintiff Rush presented defendants with a request for production of documents concerning prior firearms training provided to St. Louis police officers, including defendant Smith. Defendants responded that they had no documents concerning the annual firearms qualification program as it was when Smith graduated from the police academy or concerning changes in the program since that time; that Smith had not attended any in-service firearms courses other than annual qualifications since graduating from the academy because such courses did not exist; and that they objected to requests for all proposals or requests presented to the Board of Police Commissioners concerning the provision of firearms training to St. Louis police officers and for all complaints where it was alleged that a St. Louis police officer had misused firearms or wrongfully shot at an individual. Among documents produced by defendants was a Police Department Special Order providing for administrative investigation and report (ARTS report) regarding every incident in which an officer discharges a firearm, an annual shots fired report, and establishing a firearms review committee.

Plaintiff then presented defendants with a second request for production of documents, requesting production of the ARTS report on the incident at issue in the case, all ARTS reports prepared pursuant to the Special Order, all annual shots fired reports, and all firearms review committee reports and recommendations. Defendants objected to the requests for the ARTS reports and for the shots fired reports as burdensome.

Plaintiff filed a motion to compel discovery of the documents not produced by defendants, and on February 11, there was a hearing on this motion. At the conclusion of the hearing, the court ordered defendants to produce any documents showing purchases of firearms training equipment, any documents regarding firearms training proposals rejected during the previous seven years, and any information regarding the use or misuse of

firearms by police officers. In addition, the court ordered the Board of Police Commissioners to designate competent witnesses for deposition on this subject. Defendants produced documents regarding the purchase of firearms simulator, but no documents concerning a 1992 firearms study, no ARTS reports, and no other documents concerning the use of firearms. The Board provided a list of potential witnesses for deposition.

On the first day of trial, February 22, plaintiff argued a motion for default judgment based on allegations that defendants failed to comply with discovery orders; the motion was denied. On the third day of trial, February 24, defendants provided plaintiff with documents constituting the underlying materials for a study concerning police use of firearms conducted by the police department in 1992. That evening, plaintiff deposed the police department employee who delivered the documents. On February 25, plaintiff again raised a motion for default judgment; again, it was denied.

C. Weight of the Evidence

The facts of the incident from which this case arose were presented to the jury in the form of directly conflicting testimony by plaintiff's and defendants' witnesses. It is clear that plaintiff Rush was shot by St. Louis police officer Smith at approximately 12:30 a.m. on January 1, 1990, in or near his house. The circumstances surrounding the shooting, however, were presented differently to the jury by plaintiff and by defendants.

Plaintiff's witnesses testified that plaintiff Rush was in his house on the second floor, wearing only pajama bottoms, while Michael Mayhorn, a guest at the house, was in the backyard firing a shotgun in celebration of the new year. Rush's grandmother asked that Rush stop Mayhorn from firing further shots. Rush descended to the kitchen to do so and, while in the kitchen looking out through the screen door, was shot by Smith.

Defendants' witnesses testified that, responding to a call reporting shots in the area, officers Smith and Hardison approached the rear yard of the house and saw two figures in the yard, one of whom was firing a shotgun at them. After twelve to fourteen shots, Smith returned fire, firing a total of five shots. During this exchange, the figure with the gun, who was wearing blue pants and a dark shirt, passed it to the second figure, and entered the house. Two neighbors testified that they saw two figures in the yard. One neighbor, Pamela Rudderforth, testified that she saw one of the figures firing at two police officers who were behind a tree, and that one of the figures then slumped over and climbed up the back stairs into the house. Plaintiff's witness testified that Rudderforth could not have seen the back of the house from her window; defendants' witness testified that she could.

II. DISCUSSION

A. Juror Dismissal

Rush first argues that the trial court erred by denying his motion for a new trial on the grounds that the court's dismissal of the sole black juror and the court's comments to the jury regarding that dismissal prejudiced his trial.

We review the trial court's decision to dismiss Dorothy Bleuett from the jury for abuse of discretion. *United States v. Key*, 717 F.2d 1206, 1209 (8th Cir. 1983). "The decision of whether or not to remove a juror is normally vested in the wise discretion of the trial court. If the record shows a legitimate basis for his decision, there is not abuse of that discretion." *Id.* (citing *United States v. Peters*, 617 F.2d 503 (7th Cir. 1980)). The trial court's findings show a legitimate basis for Bleuett's dismissal. Bleuett informed the court that she would not attend court that day because she would not travel when there was almost a foot of snow on the ground. The court would not authorize a marshal to "chauffeur" Bleuett into court because, due to the snow, the

courthouse was already functioning with only a "skeleton staff" that day, and because the court did not wish to assume the responsibility of transporting a juror under dangerous road conditions. In addition, if Bleuett was driven to the courthouse, provisions would have to be made to return her to her home at the end of the day. The court further would not allow plaintiff to send a taxicab to retrieve Bleuett, because the day's proceedings were already late in beginning, and this request would cause more delay, and because the court did not find it appropriate for a party to provide transportation services to a juror. These findings show a legitimate basis for the court's decision to dismiss Bleuett and to seat instead one of the two alternate jurors available, and we find that the trial court did not abuse its discretion by dismissing Bleuett.

Rush argues that the trial court nevertheless abused its discretion because of the "importance that Plaintiff be racially represented on the jury." Appellant's Br. at 35. The court, concerned about *Batson*[2] implications, had made a special effort to make sure that Bleuett, who is black, was on the original jury despite the government's inclination to strike her. I Trial Tr. at 155-56. The remainder of the jurors empaneled were all white. Timothy Rush is black, and his fact witnesses are all also black. Of the two police officers directly involved in the incident at issue, one is white and the other black. The defendant Board of Police Commissioners is a multi-racial group. *Batson*, however, applies to a government advocate's attempt to strike potential

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[2] In *Batson v. Kentucky*, 476 U.S. 79 (1985), the Supreme Court held that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Id.* At 89. In *Reynolds v. City of Little Rock*, 893 F.2d 1004 (8th Cir. 1990), *cert. denied*, 501 U.S. 1204 (1991), this court held that the *Batson* rule applies to government counsel in civil cases as well as in criminal cases.

jurors because of their race, not to a court's decision to dismiss a seated juror for legitimate, non-racial cause. The court stated on the record a legitimate basis for Bleuett's dismissal, and the fact that she was the only black member of the jury does not invalidate that legitimate basis.[3]

More problematic are the court's comments to the jury regarding Bleuett's dismissal. The court's statements regarding the circumstances of Bleuett's empanelment and the court's views regarding the tendency of races to "stick together" are beyond inappropriate: they egregiously and obnoxiously flout even minimal standards of judicial propriety and integrity, and we strongly reprimand the court for engaging in behavior that has no place in the courts of the United States.

The plaintiff, however, failed to lodge an objection to the court's comments. When the complaining party has failed to object to the court's statements at trial, our review is for plain error only. *Cowens v. Siemens-Elema AB*, 837 F.2d 817, 823 (8th Cir. 1988); *see* Fed. R. Civ. P. 51. Regardless of the impropriety of the court's statements, plain error is found only when the court's comments destroyed the overall fairness of the trial. *Harris v. Steelweld Equip. Co.*, 869 F.2d 396, 403 (8th Cir.), *cert. denied*, 493 U.S. 817 (1989); *Williams v. Fermenta Animal Health Co.*, 984 F.2d 261, 264 (8th Cir. 1993). More specifically, we do not reverse the trial court for misconduct "unless it appears that the conduct complained of was intended or calculated to disparage the [plaintiff] in the eyes of the jury and to prevent the jury from exercising an impartial judgment upon the merits." *Id.* at 400 (internal quotations omitted). In addition,

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[3] The plaintiff also argues that we should follow *United States v. Tabacca*, 924 F.2d 906 (9th Cir. 1991). *Tabacca*, however, is readily distinguishable. In *Tabacca*, the court dismissed a juror after the jury had already retired for deliberation, leaving a jury of only eleven. *Id.* At 914. In the instant case, an alternate juror was available, and the number of jurors remained at six.

the complaining party must show that he was prejudiced by the misconduct. *Id.*

Counsel for the plaintiff did not object on the record to the court's comments, nor did he request a mistrial. The court offered to clear up any misunderstanding regarding his comments, but counsel rejected this offer. When asked by the court what he wanted the court to do, counsel replied that he wished to go on with the case. He then shifted the discussion to the topic of the first witness that day, effectively foreclosing further discussion of a remedy for the comments.

We find that the court's comments were not plain error and did not destroy the overall fairness of the trial. Although the comments were improper, they did not indicate a preference for the defendants over the plaintiff or disparage the plaintiff, nor did they reach the merits of the case or constitute advocacy in favor of either party. *See Williams*, 984 F.2d at 264 (comments not intended to suggest an opinion as to an issue in the case and comments not indicating a partiality for a party not plain error). We have often held that "a few improper comments are not necessarily enough to require reversal," *see, e.g., Hale v. Firestone Tire & Rubber Co.*, 756 F.2d 1322, 1330 (8th Cir. 1985), and have considered the weight of improper comments in the context of the length and complexity of the trial, *see id.* (court's comment in product liability case that he had "put air in a lot of tires, but [he] never had one blow up on [him]" not sufficient for reversal, because this was a minor incident in a lengthy trial); *Cowens*, 837 F.2d at 824 (comments considered in light of entire seven-volume trial transcript). In this case, we find that a single improper comment, during an eight-day trial, not reaching the merits of the case or indicating a partiality for a particular party, did not destroy the overall fairness of the trial or prejudice the plaintiff. We therefore find no plain error by the trial court.

B. Discovery

Rush next argues that the trial court erred by denying his motions for default judgment and new trial on the grounds that the Board of Police Commissioners failed to respond to discovery requests and to court orders for document and witness production. These discovery requests, however, related to a failure to train claim against the Board arising from Officer Smith's shooting of Rush. In *Los Angeles v. Heller*, the Supreme Court held that, when a police officer is found to have inflicted no constitutional injury in a § 1983 suit, it follows that this finding is dispositive as to the liability of the supervising police commission and municipality as well. 475 U.S. 796, 799 (1985) (per curiam). The supervising authorities "were sued only because they were thought responsible for [the police officer's] actions; if the latter inflicted no constitutional injury on [plaintiff], it is inconceivable that [the city and its Police Commission] could be liable." *Id.*

The documents and witnesses requested by the plaintiff from the Board were relevant to establishing a claim against the Board for failure to train police officers in the use of firearms. This claim, however, is now moot, because the jury verdict finding no constitutional violation on the part of the individual officers eliminates the basis for the Board's lability. *See Robinson v. City of St. Charles, Mo.*, 972 F.2d 974, 977 (8th Cir. 1992) (jury verdict awarding no damages to plaintiff in § 1983 suit against police officers rendered moot failure to train claim against the municipality). We find that any error regarding the course of discovery was harmless, because the question of the Board's liability is now moot.

C. Weight of the Evidence

Finally, Rush argues that the trial court erred by denying his motion for a new trial on the grounds that the jury verdict was against the weight of the evidence and resulted in a manifest

injustice. We review the trial court's decision not to grant a new trial on these grounds for abuse of discretion. *White v. Pence*, 961 F.2d 776, 781 (8th Cir. 1992). A trial court, when considering a motion for a new trial on grounds that the verdict was against the weight of the evidence, may rely on its own reading of the evidence and assessment of witnesses' credibility in determining whether a manifest injustice has occurred. *Id.* at 780. This discretion is, however, limited. When the evidence is such that reasonable persons could differ as to the result, such as a direct conflict in credible and plausible evidence, the determination is properly left to the jury. *Id.* at 781 (citing *Fireman's Fund Ins. Co. v. Aalco Wrecking Co.*, 466 F.2d 179, 187 (8th Cir.), *cert. denied*, 410 U.S. 930 (1973)); *see Washburn v. Kansas City Life Ins. Co.*, 831 F.2d 1404, 1409-10 (8th Cir. 1987).

Testimony by plaintiff's and by defendants' witnesses as to exactly what happened after midnight on January 1 was in direct conflict. Plaintiff and his witnesses, members of his household, stated that plaintiff was in the house when shot. Defendant police officers and a neighbor stated that a figure resembling Rush was in the yard when shot, that he or his companion was shooting at the officers, and that the figure entered the house after the shooting. Each story is straightforward and credible. When "diametrically opposed testimony from credible witnesses" is at issue, the choice of which story to believe is to be made by the jury, not by the trial court.[4] *White*, 961 F.2d at 781. We therefore

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[4] The court, in its order of June 1, unfortunately states that "after careful review of the evidence, the Court cannot find that there was not sufficient evidence to support [the] verdict." This language is that applicable to a motion for JNOV, not a new trial on the grounds that the verdict is against the weight of the evidence. In *White v. Pence*, the trial judge expressed his confusion regarding whether he could made an independent reading of the evidence in a motion for new trial, and stated that he thought that he could not,

(Footnote 4 continued on next page)

find that the trial court did not abuse its discretion in denying plaintiff's motion for a new trial on the grounds that the verdict was against the weight of the evidence.

III. CONCLUSION

For the above reasons, the denial of appellant's motions for a new trial and for default judgment is affirmed.

(Footnote 4 continued)

but if he could, he would grant the motion due to manifest injustice. 961 F.2d at 778. We remanded the case, finding that had the court stated its reasons for its reading of the evidence, a new trial may have been warranted. *Id.* at 782. In this case, the trial judge used incorrect language in his denial of plaintiff's motion, but he states that he made a careful review of the evidence, and gives no indication that he had reason to find any of the witnesses incredible. Because, upon our review of the record, we find that a new trial is precluded in this case as one in which reasonable persons could differ as to the result to be drawn from the evidence, the trial court's erroneous statement of the standard is harmless error. We, however, strongly encourage the court to take care to state the correct legal standards in future orders.

McMILLIAN, Circuit Judge, dissenting.

Because I believe that the trial judge's improper conduct in the present case constituted plain error, I respectfully dissent. The trial judge's handling of the dismissal of the lone African-American juror was reprehensible, and more than a nicely-worded reprimand is required to remedy the judicial misconduct in this matter.[1] Appellant, Timothy Rush, was denied the fundamentally fair trial that due process guarantees. Thus, the district court abused its discretion in failing to grant Rush's motion for a new trial. I would reverse and remand this case for the new trial that Rush deserves.

Rush, who is African-American, filed this civil rights action pursuant to 42 U.S.C. § 1983 claiming that two police officers used excessive force against him. Resolution of this matter required the jury to choose from two conflicting accounts of what happened during the early morning hours of January 1, 1990. Rush claimed that around the time of the incident, 12:37 a.m., he was in his home with his grandmother and his cousin. Meanwhile a friend, Michael Mayhorn, was in Rush's backyard, celebrating the New Year by firing a shotgun into the air. Rush's grandmother asked Rush to tell Mayhorn to stop firing the shotgun and to come inside. Rush approached the kitchen door, wearing only pajama bottoms, to ask Mayhorn to cease firing the shotgun. Rush testified that while standing sideways bent over between the storm door and the wooden door and looking into the backyard, he was shot in the abdomen by one of the police officers. Immediately after being shot, Rush made his way to a telephone in the hallway of his home and called 911 for assistance. The testimony of Rush's grandmother and his cousin corroborated Rush's version of the facts.

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[1] Of course, I am in full agreement with the majority opinion's strong reprimand.

The two police officers told a different story. They were dispatched to Rush's neighborhood in response to a report that shots had been fired. They claim that they were fired upon by a shotgun as they approached Rush's backyard. They saw two men standing below the rear steps of the entrance of the home. At trial, neither officer could identify Rush as having been one of the two men. Both officers did testify that the man firing the shotgun was wearing pants and a shirt. Officer Smith claimed that 25-31 shotgun blasts were fired at them and that the officers returned 13-16 shots before notifying the dispatcher of the situation. Smith testified that after he fired two shots, his first target slumped over, handed the shotgun to the other man, and entered the house through the rear steps.

Rush was indicted in connection with this incident on state charges of first degree assault, armed criminal action, and unlawful use of a weapon. However, these charged were later dropped. Robert Craddick, an assistant circuit attorney for the city, testified that he explained to Smith that the pattern of the bullet holes (i.e. holes made by shots fired by the police officers) and other physical evidence revealed inconsistencies in his version of the incident. Upon hearing this explanation of the weaknesses in the case, Smith offered to change his account and even admitted that Rush could have been inside the house when shot. After the memo of *nolle prosequi* was submitted on all charges, Smith tried to get Craddick to reinstate the charges because he feared that he would be sued if Rush was not prosecuted.

Even this brief review of the record clearly demonstrates the critical importance of the jury's assessment of witness credibility. "A trial judge must be especially cautious and circumspect in language and conduct during a jury trial. The judge must be fair to all parties and not do or say anything that might prejudice either litigant in the eyes of the jury." *Coast-to-Coast Stores v. Womack-Bowers*, 818 F.2d 1398, 1401 (8th Cir. 1987). Every

person who has the high honor to serve as a member of the judiciary must fervently adhere to the fundamental principles of judicial conduct because, as the Supreme Court has noted, "[i]t is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his [or her] lightest word or intimation is received with deference, and may prove controlling." *Starr v. United States*, 153 U.S. 614, 626 (1894); *accord Travelers Ins. Co. v. Ryan*, 416 F.2d 362, 264 (5th Cir. 1969) ("By reason of his role, quickly observed by jurors, the judge is a figure of over-powering influence, whose every change in facial expression is noted, and whose every word is received attentively and acted upon with alacrity and without question.") When viewed against the exacting requirements for proper judicial behavior, the trial judge's conduct in the present case falls far short of our standards.

While I am most concerned with the comments made by the trial judge in the presence of the jury, I will also discuss certain comments made by the trial judge to Rush's counsel outside of the hearing of the jury because it is important to understand the context in which the improper remarks were made to the jury in order to appreciate the gravity of the trial judge's misconduct. Moreover, it is appropriate to consider the record as a whole when conducting a review under the plain error standard. *United States v. Solomonson*, 908 F.2d 358, 361 (8th Cir. 1990).

The majority opinion explains that the trial judge denied the request of Rush's counsel to send a taxicab for Dorothy Bleuett, the absent juror, because of a concern over delay and "because the court did not find it appropriate for a party to provide transportation services to a juror." These reasons were in fact proffered by the trial judge in the post-trial order denying Rush's motion for a new trial. *Rush v. Smith*, No. 91-1430C(2), slip op. at 4 (E.D. Mo. June 1, 1993) (Memorandum and Order). However, on the day of the trial in question, the trial judge held a different view. Speaking with counsel about his refusal to send a United States marshal to pick up Bleuett, the trial judge said:

> You'll have to get your own jurors, it's ten o'clock, you've known about his situation since nine o'clock. If you felt like you wanted to do it yourself or get a cab or something like that and get her in, I would have no problem with that as long as there was no conversation with her on the way, but as it stands now, I intend to proceed with what jurors I have as long as I have six.

Joint Appendix at 156. In my view, it was wholly unreasonable to expect Rush's counsel to make any sort of contact with a juror outside the courtroom without first seeking permission of the court. For the trial judge to base his refusal on counsel's one-hour delay while waiting for the trial judge to arrive, is, to my mind, arbitrary and unfair.[2]

After the trial judge made these statements, Rush's counsel asked to make a statement on the record with regard to the dismissal of the juror. His remarks, in part, were as follows:

> Mr. Singer [Rush's counsel]: We have the Marshal here, had agreed and was beginning on his way to pick up this juror when the Court informed and indicated to him not to. We were then told that the Court would address this matter when the Judge arrived. We were here for the scheduled motions at a quarter to nine this morning and the Court has just arrived here. We do not know our juror lists have been taken, we don't know where she lives. We would be in a position of picking up a juror in this case, which would make a contact with the Plaintiff. Judge, this is a very serious matter. She was left on the jury with reference to [*Batson*[3] motion] and she's an elderly woman and she

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[2] I see no reason why the trial judge could not have allowed Rush's counsel to send a cab to pick up the juror, provided that defendants had no objection and that the juror did not know who paid for the transportation.

[3] *Batson v. Kentucky*, 476 U.S. 79 (1985).

> informed the Court that her only transportation here was public transportation. It's — that is a very serious prejudice to our client's case . . . .

Joint Appendix at 156-57.

Rush's counsel then emphasized the hardship caused by the inclement weather[4], and stated that it was his understanding that the other divisions of the courthouse were not meeting that day, and that the courthouse had in fact been closed by the Chief Judge of the Eastern District of Missouri. The trial judge then told counsel that his information was not correct regarding the status of courthouse activity and admonished counsel that "you better get your facts straight." The following exchange occurred immediately thereafter:

> Mr. Singer: Well, Judge the information I had received was from your staff.
>
> The Court: Okay. Well, that's not true. You get information from me if you will, and I've tried to give you accurate information.
>
> Mr. Singer: They were here.
>
> The Court: Well, now you got that dig in twice. I'm an old man. I'm seventy-six years old, I've got a wife that's in charge of [a local hospital department], she got into a ditch this morning. I went out, put a chain on my car, pulled her out of the ditch. I've done all the things that I can do to preserve my family and to maintain this trial and I don't need any snide remarks about the time of my arrival.

Joint Appendix 158-59. I have included this excerpt from the trial transcript because it clearly demonstrates the trial judge's

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[4] The record provides that St. Louis received between 10 to 14 inches of snow.

inappropriate demeanor. When a judge dons the robe, he or she must put aside all personal preoccupations, no matter how troubling they may be. In the present case, the trial judge let his personal life affect his judicial temperament, and as a result, he exhibited undue hostility toward Rush's counsel, who was only acting in the best interests of his client.

In concluding that there was no plain error in the present case, the majority opinion fails to consider the hostility, as evidenced by this exchange, the trial judge exhibited toward plaintiff's counsel immediately prior to the trial judge's improper comments about racial solidarity to the jury. A review of the transcript and the context surrounding the trial judge's improper comments demonstrates that, under the circumstances, the restrained and somewhat awkward attempt by Rush's counsel to suggest corrective action to the trial judge was an understandable approach. *See* slip op. at 3. In light of the events of the day in question, I would deem the attempt on the part of Rush's counsel to point out the trial judge's error without further provocation to be sufficient to qualify as a contemporaneous objection. From my perspective, however, whether counsel lodged a contemporaneous objection is of no great consequence because, as I have indicated, it is my opinion that the trial judge's improper comments constituted plain error.

Shortly after the exchange between Rush's counsel and the trial judge, the jury was called into the courtroom, and the trial judge made the following opening remarks:

> Your eyeballs will indicate that your Juror Number Two is absent and we've previously discussed that, so we're going to proceed without her. Something just occurred to me, though, when I was being mildly scolded by the Plaintiff's attorneys for starting court late, that it was this Court's insistence or relative insistence that we have a black juror in this case, that put the black juror to the missing juror, Dorothy Mae Bleuett in the box. I told all of you and I'm

> going to say this in front of the jury, it doesn't make any difference. It's a truth and I'm not afraid of the truth, but I was sincerely afraid of striking the only two blacks that were on that jury, that the Courts of Appeals would look askance at anybody being able to single out a particular race and eliminating them from consideration of this jury, so I, and I'm gonna take credit for this, I'm sorry, I've got to, I've got to preserve the justice and pursuit of justice by this Court, prevailed upon the City to put at least one of those black ladies on this panel so that Mr. Rush would be at least represented ethnic-wise or race-wise. I just, I'm not a damn fool. I haven't been around here for seventy-six years and not found out that the races have a tendency to stick together and that may be good or bad, but whatever it is, it exists.

Joint Appendix 160-61. I cannot overstate the injudiciousness of these remarks. In a situation where all the court had to do was tell the jury that a juror was unable to attend and that an alternate would take her place, the trial judge recklessly launched into this improper commentary. His remarks would be shocking even if made in chambers, but before a jury, they are unfathomable.

Before addressing the impropriety of the trial judge's comments, I first note that the trial judge should not have told the jury that Rush's attorney "scolded" him for being late. The transcript reveals that Rush's counsel did nothing of the sort. Moreover, even if Rush's counsel had scolded him, the trial judge should have refrained from making such a reference because of the danger that such characterization might unfairly disparage Rush and Rush's counsel in the jury's eyes. However, this indiscretion pales in comparison to the comments which followed.

Most importantly, the trial judge committed plain error by telling the jury that the races have a tendency to stick together. The irreparable damage caused by the utterance of this polarizing remark to an all-white jury hearing a civil rights case brought

by an African-American whose corroborating witnesses were also African-American is self-evident. Such insidious notions have no place in our society, let alone our courtrooms. While I remain optimistic that some day such thinking will be uniformly greeted with incredulity and contempt, we have not progressed so far that I can rest assured the trial judge's comments fell upon deaf ears. Whether intentional or not, the trial judge's remarks infected the courtroom and plainly deprived Rush of a fair trial.

While the trial judge's improper comments were not directed at the merits of Rush's case, I am gravely concerned they might have effectively undermined the credibility of his witnesses. A similar case was considered by a New York state appeals court over thirty years ago in *People v. Burris*, 241 N.Y.S.2d 75 (App. Div. 1963). That court's appreciation of the inequity of weighing testimony on the basis of racial similarity is instructive:

> In our opinion, the defendant did not receive a fair trial. Both the court and the assistant district attorney suggested to the jury that the identification of the defendant by the complaining witness should be weighed in the light of the fact that both defendant and the witness were negroes. We have firmly rejected the weighing of testimony on the basis of racial similarity or dissimilarity of witnesses. As identification here turned on the testimony of a single witness, a new trial is necessary to correct the possible effect on the jury of an argument which should be eschewed as false in its premise and divisive in its result.

Id. (citation omitted). The wisdom of that court's decision is compelling. While the trial judge in the present case did not expressly state that Rush's witnesses should be discredited, I believe that the danger of his implication demands a new trial as well. Even an inadvertent and indirect suggestion that Rush and his corroborating witnesses gave a consistent account of the events because of racial solidarity, and not because of their

sworn duty to tell the truth, is completely intolerable.[5] Moreover, because of the impracticality of determining what effect the racial remark had on the jury, I believe that the requirement of a showing of actual prejudice is inappropriate. Again, I point to the result in *Burris*. In that case, the court realized the importance of witness credibility and therefore determined that the "possible effect" on the jury was sufficient to merit a new trial. I believe that on the particular facts of this case, the potential for prejudice in the minds of the jurors was so great that no actual prejudice need be shown.

Because I am firmly convinced that the trial judge's error in this case substantially affected the constitutional rights of Timo-

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[5] In addition, I believe the majority opinion may have relied upon a misreading of our precedent. The majority opinion states that "we do not reverse the trial court for misconduct 'unless it appears that the conduct complained of was intended or calculated to disparage the [plaintiff] in the eyes of the jury and to prevent the jury from exercising an impartial judgment upon the merits.'" Slip op. at 9, *citing Harris v. Steelweld Equip. Co.*, 869 F.2d 396, 400 (8th Cir.) (*Harris*), *cert. denied*, 493 U.S. 817 (1989). This statement appears to indicate that we will only reverse for intentional judicial misconduct. However, the portion of the majority opinion's statement which quotes *Harris* is derived originally from *Goldstein v. United States*, 63 F.2d 609 (8th Cir. 1933) (*Goldstein*). The quoted excerpt appearing in the majority opinion omitted the following introductory clause: "An appellate court should be slow to reverse a case for the alleged misconduct of the trial court, unless . . . ." *Id.* at 613. The omitted section, however, is crucial to a proper understanding of the precedent. The *Goldstein* court did not say that we *will not* reverse for judicial misconduct which is unintentional. Rather, it wisely provided that in the absence of intentional misconduct, the court should be "slow" to reverse for alleged misconduct of the trial court. This language was quoted in its entirety in *La Barge Water Well Supply Co. V. United States*, 325 F.2d 798 (8th Cir. 1963). However, in *Harris*, the case relied upon by the majority opinion, the opinion did not include the first clause of the sentence and employed the altered version. Common sense tells me that there may be instances, though rare, where a court's misconduct may be plain error and yet unintentional. The desire to preserve this possibility accounts for the approach of the *Goldstein* court to the question of judicial misconduct.

thy Rush by destroying the fundamental fairness of the entire proceeding, I would reverse and remand for a new trial. Accordingly, I dissent.

A true copy.

Attest:

CLERK, U.S. COURT OF
APPEALS, EIGHTH CIRCUIT.

APPENDIX D

(JURY ENTERS THE COURTROOM)

THE COURT: I want to compliment you all for making it. Be seated and be comfortable. Your eyeballs will indicate that your Juror Number Two is absent and we've previously discussed that, so we're going to proceed without her. Something just occurred to me, though, when I was being mildly scolded by the Plaintiff's attorneys for starting court late, that it was this Court's insistence or relative insistence that we have a black juror in this case, that put the black juror to the missing juror, Dorothy Mae Bluett in the box. I told all of you and I'm going to say this in front of the jury, it doesn't make any difference. It's a truth and I'm not afraid of the truth, but I was sincerely afraid of striking the only two blacks that were on that jury, that the Courts of Appeals would look askance at anybody being able to single out a particular race and eliminating them from the consideration of this jury, so I, and I'm gonna take credit for this, I'm sorry. I've got to, I've got to preserve the justice and pursuit of justice by this Court, prevailed upon the City to put at least one of those black ladies on this panel so that Mr. Rush would be at least represented ethnic-wise or race-wise. I just, I'm not a damn fool. I haven't been around here for seventy-six years and not found out that the races have a tendency to stick together and that may be good or bad, but whatever it is, it exists. She is not here through no fault of anybody here. The Marshal was talking about going out and getting her and there was a phone communication from her that she wasn't coming out in this weather under any circumstances. That's why I had eight jurors. That's why I had two extras in case I lost one to weather or illness or anything else. Now I've got seven. My position's getting a little more tenuous, but that's alright. I got seven, so I'm gonna go with seven. Now, let's go.

MR. FITZGIBBON: Can I approach the bench?

THE COURT: You have something?

SIDE-BAR CONFERENCE

MR. FITZGIBBON: Judge, I don't, — I was not really, — I was listening, but did you indicate to the jury which side struck the juror?

THE COURT: No, I did not.

MR. FITZGIBBON: Because, —

THE COURT: I didn't, no, I would not do that.

MR. FITZGIBBON: Okay.

THE COURT: Of course not. I just said it came to me that way and I was disturbed by it. I didn't say who struck them.

MR. SINGER: Okay, what else?

MR. DICK: Your Honor, I couldn't tell if I'd been away from the microphone. I know the Court's intention is good, but I would just, I think what was said might give the impression that the City was the one who graciously put a black juror on.

THE COURT: I put the black juror on. I said, "I did it." I asked the attorneys to do it. I didn't say which one.

MR. SINGER: Alright.

THE COURT: Do you remember the facts otherwise?

MR. SINGER: Pardon?

THE COURT: Do you remember the facts otherwise?

MR. SINGER: I thought the City gracious, — I thought you used the term that the City graciously agreed and maybe I'm mistaken, Judge, but, —

THE COURT: Well, I'll clear it up if I did.

MR. SINGER: Well, now Judge, I think that'll only emphasize what was done.

THE COURT: Well, what do you want me to do?

MR. SINGER: Well, I mean, I'd like to go on and try this case. If your Honor thinks he can correct the measure without any further emphasis, —

THE COURT: Okay, let's go.

MR. SINGER: — then I would agree to do it, but, — Okay. The first witness, we had asked the City to produce Mr. Scott. We had subpoenaed these people and Mr. Scott, —

Supreme Court, U.S.
FILED
SEP 27 1995
CLERK

(2)

NO. 95-368

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

JAMES SMITH, SILAS HARDISON, DAVID ROBINSON, JAMES CONWAY, RITA KRAPF, NESBY MOORE, VINCENT SCHOEMEHL,

Petitioners

v.

TIMOTHY RUSH,

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TIMOTHY RUSH
Pro Se
1959A Cherokee
St. Louis, MO 63118
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32 pp

TABLE OF CONTENTS

Counterstatement of Question Presented i

Table of Authorities ii

Statement of the Case 1

Reasons for Denying the Writ of Certiorari 12

Conclusion 27

COUNTERSTATMENT OF QUESTION PRESENTED

Respondent respectfully suggests that the issue framed by Petitioner is more accurately stated as follows:

Whether racially polarizing remarks made by a White trial judge directly to an all White jury in the context of a civil rights action brought by an African-American, whose occurrence witnesses are also African-American, constitutes plain error.

TABLE OF AUTHORITIES

Arizona v. Fulminante, 499 U.S. 279 (1991) 19

Batson v. Kentucky, 476 U.S. 79 (1986) 1, 3, 21

Braxton v. United States, 500 U.S. 344, (1991) 27

Brooks v. Kemp, 762 F.2d 1383, (11th Cir. 1985) (en banc), cert. denied, 478 U.S. 1022, (1986) 14

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) . 23

Coast to Coast Stores v. Womack-Bowers, 818 F.2d 1398, (8th Cir. 1987) 15

Edmonson v. Leesville Concrete Co., Inc., 860 F.2d 1308 (5th Cir. 1988) 23

Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614 (1991) 15, 21

Gearhart v. Uniden Corporation of America, 781 F.2d 147 (8th Cir. 1986) 14,18

Hong v. City of St. Louis, 698 F.Supp. 180 (E.D. Mo. 1988) . 18

Marshall v. Jerrico, Inc., 446 U.S. 238 (1980) 17

Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Moquin, 283 U.S. 520, (1931) 13

In Re Murchison, 349 U.S. 133, (1955) 17

New York Cent. R. Co. v. Johnson, 279 U.S. 312, (1929) . 13, 14

Offut v. United States, 348 U.S. 11 (1955) 17

Pappas v. Middle Earth Condominium Association, 963 F.2d 534 (2nd Cir. 1992) 14, 17, 18

Rojas v. Richardson, 703 F.2d 186 (5th Cir. 1983) reversed on other grounds 713 F.2d 116 . . . . . 14, 18

Rose v. Mitchell, 443 U.S. 545 (1979) 20, 22, 23

Rush v. Smith, et al., 45 F.3d 1197 (8th Cir. 1995) . . 2, 16, 23

Rush v. Smith, et al., 56 F.3d 918 (8th Cir. 1995) (en banc) 14, 16, 17, 19, 22, 24

Starr v. United States, 153 U.S. 614 (1894) 15

Travelers Ins. Co. v. Ryan, 416 F.2d 362, (5th Cir. 1969) . 15

United States v. Bland, 697 F.2d 262 (8th Cir. 1983) . . 19, 20

United States v. Chase, 838 F.2d 743 (5th Cir.) cert. denied, 486 U.S. 1035, (1988) 13

United States v. Doe, 903 F.2d 16 (D.C. Cir. 1990) . 13, 14, 17

United States v. Janis, 831 F.2d 773 (8th Cir. 1987), cert. denied, 484 U.S. 1073 13

United States v. Olano, 113 S.Ct. 1770 (1993) 19, 22, 24

United States v. Tabacca, 924 F.2d 906 (9th Cir. 1991) . . . 20

Vasquez v. Hillery, 474 U.S. 254 (1986) 18, 20, 22, 23

STATEMENT OF THE CASE

Petitioners' Statement of the Case is substantially correct.[1] However, a more detailed statement is necessary in order that the Court may have a better picture of prejudice resulting from the racially polarizing comments of the trial court, and the circumstances under which those comments were made.

The panel of jurors from which the jury was selected contained only two African-Americans. Defendants utilized preemptory challenges to strike both of these potential jurors. However, one of the African-Americans was ultimately on the jury as a result of a Batson type challenge. (T. Vol. I, 155-156.)

On the morning of the fourth day of trial, there had been a snow storm in St. Louis and there was approximately 10 to 12 inches of snow on the ground. The African-American juror did not appear for trial on that date due to the weather conditions and the necessity of using public transportation.

A marshall volunteered to pick up the juror and left to do so. However, he was recalled by the trial judge when the judge was informed of such after telephoning chambers personnel. Counsel was informed that the judge would address the problem of the missing juror when he arrived at court. When the judge arrived, approximately one hour later, he refused to allow Plaintiff the time to seek alternate transportation for the African-American juror. The majority of the Eighth Circuit Appellate Panel

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[1] Petitioners' Statement at page 4 that Rush was shot in the abdomen is incorrect. Rush was shot in the upper left chest and the bullet was surgically removed from his abdomen. His attending surgeon testified this trajectory was consistent with Rush standing bent at the waist when shot, as Rush testified, and not standing upright as Defendants contended. (T. Vol. III 127, 131.)

explained the trial judge's denial of the request to send a taxi cab for the African-American juror because of a concern over delay and because the court found it inappropriate for a party to provide transportation for a juror. Rush v. Smith, 45 F.3d 1197, 1201 (8th Cir. 1995). Although these reasons were set forth by the trial judge in his post-trial order denying Appellant's Motion for New Trial, on the day of the trial in question, the Judge held a different view:

> you'll have to get your own jurors, it's 10:00, you've known about this situation since 9:00. If you felt like you wanted to do it yourself, or get a cab or something like that and get her in, I would have no problem with that . . ..

Id. at 1205 (quoting joint appendix "JA" 156).

Although the Court would not allow the marshall to pick up the sole African-American juror, and would not allow Plaintiff time to have a cab sent, at a later point in the trial after another juror had been dismissed, the Judge instructed the remaining all White jury that if any of them were unable to get into court or had any excuse for not coming to court, he would send the marshall to pick them up. (T. Vol. IV, 201-202.)

Subsequent to these comments, counsel for Rush requested to make a statement for the record regarding the absence and dismissal of the juror:

> Mr Singer: (Rush's counsel): "We have the marshall here, had agreed, and was beginning on his way to pick up this juror when the Court informed and indicated to him not to. We were then told that the Court would address this matter when the Judge arrived. We were here for the scheduled motions at a quarter to nine this morning and the Court has just arrived here . . .. Judge, this is a very serious matter. She was left on the jury with

> reference to a (Batson) Motion and she's an elderly woman and she informed the Court that her only transportation here was public transportation. That is a very serious prejudice to our client's case . . . (T. Vol. IV, 5-6).

Counsel for Rush then stated to the Court his understanding that the courthouse had, in fact, been closed due to the snow storm. The Judge then responded that counsel's information was incorrect and "I'm telling you that you've misinformed the court about the courthouse closing. . . you better get your facts straight." (T. Vol. IV, 7.) The following occurred immediately thereafter:

> Mr. Singer: Well, Judge, the information I had received was from your staff."
>
> The Court: "Okay. Well, that's not true. You get your information from me if you will, and I've tried to give you accurate information."
>
> Mr. Singer: "They were here."
>
> The Court: "Well, now you got that dig in twice . . . I don't need any snide remarks about the time of my arrival (T. Vol. IV, 7-8).

These comments demonstrate the trial judge's inappropriate demeanor and hostility directed toward counsel for Rush. The comments made by the White trial judge directly to the all White jury should be considered in the context of this environment of hostility. Shortly after this exchange, the jury was called into the courtroom, and among the judge's opening remarks were the following:

> I'm not a damned fool. I haven't been around here for 76 years and not found out that the races have a tendency to stick together and that may be good or bad, but whatever it is, it exists. (T. Vol. IV, 19.)

During these remarks, the judge also told the jury that he had been scolded by Rush's counsel regarding his time of arrival.

The comments of the trial court must be considered in the context of the trial of this case. Resolution of this matter required the jury to choose from two conflicting accounts of what happened during the early hours of New Year's Day, 1990. A brief review of the record will demonstrate the critical importance of the jury's assessment of witness credibility, which was directly commented upon by the trial court, and the clear lack of credibility on the part of Defendants' two main witnesses.

Rush, who is African-American, claimed that, at the time of the incident, he was in his home with his grandmother and cousin, both of whom are also African-American. A friend, Michael Mayhorn, was in the back yard celebrating the New Year by firing a shotgun into the air. Rush's grandmother asked him to have Mayhorn stop firing the shotgun and come into the house. Rush went to the kitchen door of his residence, barefoot and wearing only pajama bottoms, in order to get Mayhorn to stop shooting and come into the house. Rush testified that while bent over, standing sideways between the storm door and inner wooden kitchen door, he was shot in the chest by Defendant Smith. The testimony of Rush's occurrence witnesses, all of whom were African-American, corroborated his version of the facts, and was consistent with their statements given to police on the date of the incident.

The testimony of the two police officers was diametrically opposed to that of Rush and his witnesses. They testified that they received a radio call to Rush's neighborhood to respond to a call that shots had been fired in the area. According to them,

they were fired upon by an individual with a shotgun as they approached Rush's back yard. Smith testified that during this encounter, anywhere from 25 to 31 rounds from a 12-gauge bolt action shotgun were fired directly at him and Hardison. There was no damage to any structure or fixture from this massive amount of firepower. They testified that the alleged suspect would hold the gun to his shoulder, fire four to five rounds, reload and fire another four to five rounds. However, under laboratory conditions, the police firearms expert could only get the weapon to chamber one round at a time, which would necessitate reloading after each shot. When this discrepancy was noticed by a homicide detective, the firearms expert re-examined the weapon, made certain repairs and maintenance and only then was able to get the weapon to hold multiple shells so that more than one shot could be fired without reloading. The officers testified that they observed two men standing near the steps to the rear entrance to the Rush home. However, neither officer could identify Rush as being one of the two men in the rear yard. (T. Vol. VI 101, 103.) Nor could any other witness identify Rush as having been in the rear yard.

Rush was indicted in connection with this incident on charges of First Degree Assault, Armed Criminal Action and Unlawful Use of a Weapon. (T. Vol. II, 53.) These charges were subsequently dropped. Robert Craddick, an Assistant Circuit Attorney for the City of St. Louis testified that after he explained to Smith that the physical evidence, in particular the pattern of bullet holes in the door, was inconsistent with his version of the incident, Smith was willing to change his explanation of how the shooting occurred and admitted that Rush could well have been inside his residence

between the two doors when shot. Craddick also testified that Smith attempted to have the charges reinstated due to his fear that he would be sued if Rush was not jailed. (T. Vol. II, 128-129, 142.)

Significantly, Smith admitted at trial under cross examination, that Rush may well have been in the kitchen of his home, and not outside in the rear yard, when Smith shot him: "There's nothing to say I couldn't have possibly hit him with the bullet that went through the screen." (T. Vol. VI, 191.) This was also the conclusion of the internal affairs investigator who conducted the separate investigation of the incident on behalf of the police department. (T. Vol. II, 102.)

Defendants' main non-police witness, Pamela Rudderforth, who is White, at the time of the incident lived in a two-story house directly behind and to the north of Rush's residence. She testified that on the evening in question she was able to clearly observe the shooting incident from her second floor bedroom window. (T. Vol. V, 41-52.) However, Karl Kinsky, a member of the Bar, went to her home in the Spring of 1990, along with an investigator from the Public Defender's Office. Mr. Kinsky testified that, during daylight hours, he looked through Rudderforth's bedroom window and was unable to see what Rudderforth alleged she could see in the middle of the night. (T. Vol. II, 111-112.) Photographs were taken at that time which were introduced into evidence and verified Kinsky's testimony that, due to physical obstructions, the area of the alleged shooting could not be seen from Rudderforth's window. (T. Vol. II, 112.) Plaintiff's expert, D. Wayne Heil, also testified that, during daylight hours, he looked through the

second floor bedroom window of Rudderforth's home and was not able to see what she alleged she could see during darkness. (T. Vol. II, 188-189, Vol. III, 55.) To verify this, Heil took photographs through both sides of the double pane window. (T. Vol. II, 188-189.)

It is also highly significant that, at the time of the incident, Rudderforth was harboring a fugitive in her home wanted on felony charges of child molestation. (T. Vol. V, 69-70.) She testified that the police knew the fugitive was there, but chose not to arrest him. (T. Vol. V, 73.)

Both Smith and Hardison testified, and stated in the official police report, that they were able to see the color of the trousers worn by the two subjects in the rear of the Rush home. (T. Vol. VI, 111, 163.) However, the police evidence technician took a photograph of Smith and Hardison standing in the rear yard of the Rush residence, behind a vegetation-covered fence, where the color of their trousers could not be seen. (JA 224.) The evidence officer testified that there was absolutely no reason for taking this photograph other than to depict where the two subjects had been standing at the time they were encountered by Smith and Hardison. (T. Vol. VII, 174.) Likewise, the trial court recognized that this photograph was an obvious reenactment. (T. Vol. V 24.)

Medical evidence was presented, through the deposition of Dr. Harry D'Augustino, that the bullet which struck Rush entered through the upper left portion of his chest and was removed from the area of his abdomen. (T. Vol. III, 127.) According to the doctor, this was consistent with Rush standing bent at the waist at

the time that he was shot. (T. Vol. III, 131.) This was consistent with Rush's testimony that he was bent peering out the back door of his house when shot, rather than standing upright as urged by Defendants. Mr. Heil, Plaintiff's expert, also testified that the trajectory of the wound was consistent with Rush standing bent over in the manner which he described. (T. Vol. II, 175). This evidence was unchallenged by Defendants.

During the course of the shooting incident, Smith fired five rounds from his revolver. No shots were fired by any police officer other than Smith.[2] (T. Vol. VI 115, 168, 171.) All five of the bullet projectiles from the shots fired by Smith were subsequently accounted for. (T. Vol. III, 74.) Two bullets were recovered from the interior wooden door leading from the kitchen to the rear yard of Plaintiff's home. (T. Vol. III, 48, 51, V. 38.) One bullet was recovered from Plaintiff during surgery. (T. Vol. III, 127.) One bullet was recovered on the kitchen counter of Plaintiff's home. (T. Vol. I, 195-196.) The fifth, and final, bullet was recovered from a second floor bedroom wall. (T. Vol. II 163-164.)

Of the five projectiles, only two were recovered by the police department: the bullet in Plaintiff's abdomen and the bullet in the lower portion of the wooden kitchen door. (T. Vol. III, 48, 51.) The bullet on the kitchen counter was found by Margaret Seltzer, Plaintiff's grandmother, and turned over to members of the Public Defender's staff. (T. Vol. I, 195-196.) The remaining two

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[2] The opinion of the Court of Appeals erroneously lists the number of shots fired by the police during the course of this incident. There was no dispute at trial that only five rounds had been fired by police.

bullets were recovered by Plaintiff's expert, D. Wayne Heil: the bullet in the upper portion of the wooden kitchen door and the bullet from the upstairs bedroom wall. (T. Vol. II, 163, Vol. III, 50.)

Four of those five bullets were positively identified through ballistic comparison as having been fired from Defendant Smith's gun. Those bullets so identified were the two from the interior rear kitchen door (T. Vol. II, 218, Vol. VI, 12-13), the bullet from the second floor bedroom wall and, the bullet from Rush's abdomen (T. Vol. III, 56, 167, 220-221, 219, Vol. VI 13-14). The fifth bullet, the one recovered from the kitchen counter and subsequently turned over to the public defender's office, was lost by that office. (T. Vol. I 195-196.) However, there was evidence from two witnesses, both members of the Bar and former public defenders, that the bullet was silver in color (T. Vol. II, 60, 106). Winchester-Western is the only company that manufactures silver tipped bullets - the type carried by St. Louis police officers. (T. Vol. III, 74, Vol. IV, 81.)

Each of the five bullets fired by Smith was traced to a specific bullet hole into the rear of Rush's home. There was one bullet hole through the kitchen window to the west of the rear kitchen door. This was the bullet recovered by Margaret Seltzer, Rush's grandmother. (T. Vol. I, 195-196). There was one bullet hole through the second floor bedroom window (T. Vol. II, 28, 56, 163-164). There were three bullet holes through the outer rear storm door: one through the top glass portion, one through the

middle screen portion, one through the bottom metal portion. (JA 138-139.) There was no damage to the storm door or the inner door before this incident. (T. Vol. I 184-186, Vol. II 19, 49.)

No evidence was presented that any of these entrance holes into the Rush home were anything other than bullet holes. The official police report prepared on the incident lists the four holes on the first floor of the residence as apparent bullet holes. (JA 138-139.) Nowhere in that official report is there any question that these were not bullet holes. A second investigation was performed by the Police Internal Affairs Division, as is done in all incidents where someone is shot by a police officer. That report also notes the four bullet entry holes into the rear first floor of the Rush home. (JA 112-118.) Like the homicide report, the Internal Affairs report does not question the fact that these four holes are bullet holes. None of the homicide detectives who conducted the initial investigation of this incident could testify that these entries into the Rush home were anything other than bullet holes. (T. Vol. IV, 194, Vol. V, 72, 121-124.) Plaintiff's expert, D. Wayne Heil, testified that there was nothing inconsistent with these being bullet holes and that the holes evidenced a pattern of fire. (T. Vol. II, 165, 170, 172, 205, 226, Vol. III, 111.) Even Defendants' expert, William George, could not offer an opinion that these five holes were anything other than bullet holes. (T. Vol. VI, 14.) Every witness to testify at trial who discussed the nature of the holes in the Rush residence stated that all of the holes were bullet holes, apparent bullet holes, or could offer no opinion that they were anything other than bullet holes.

The most significant piece of physical evidence was the rear storm door which contained three bullet holes. The bullet hole through the top glass portion of the storm door had a corresponding bullet hole in the inner wooden door of the kitchen. (JA 138-139.) A bullet was recovered by Plaintiff's expert from the upper portion of the wooden inner door which was ballistically matched to Smith's gun. (T. Vol. VI, 13.) The bullet hole through the lower metal portion of the rear storm door also had a corresponding bullet hole in the lower wooden portion of the inner door. (JA 139.) This bullet was recovered by the police and was ballistically matched to Smith's gun. (T. Vol. VI, 12, Vol. II, 218.) There was no corresponding damage to the inner wooden door from the bullet that entered through the middle or screen portion of the storm door. (T. Vol. III, 40.) The lack of a corresponding hole in the inner door meant that there had to be an animate object between the doors. (T. Vol. II, 205.) That animate object was Timothy Rush.

REASONS FOR DENYING THE PETITION

INTRODUCTION

In the case at bar, the Court of Appeals for the Eighth Circuit, in its majority opinion, did not depart from prior Supreme Court precedent in the context of reviewing for plain error judicial comments appealing directly to the racial bias or xenophobic tendencies of the jury. The Court of Appeals for the Eighth Circuit acted well within its remedial authority in reversing as plain error racially polarizing comments made by a W White judge to an all White jury in the context of a civil rights action brought by an African-American whose occurrence witnesses were also African-American.[3]

The opinion by the Eighth Circuit Court of Appeals is not in conflict with decisions of other Courts of Appeals. Research has failed to disclose a single case, other than the case at bar, where a federal trial judge has directed comments to the jury which appeal directly to the inherent racial bias of the jury.

A grant of certiorari in this case would proclaim to the American public that in this day and age such egregious appeals to

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[3] Of the two main police Defendants, one was white and one was African-American. Also in the courtroom during the entire presentation of Rush's case were an additional five police Defendants, all of whom were white. These additional white officers, sued on a conspiracy basis, were later dismissed from the case by Rush. The members of the Board of Police Commissioners, a racially diversified group, were also named as Defendants. However, no member of the Police Board ever appeared at trial. Thus, six of the seven Defendants present during trial were white.

bias and prejudice may sometimes be tolerated in the courts of the United States.

Accordingly, this Court should deny certiorari in this matter.

I. THE PETITION SHOULD BE DENIED BECAUSE THE QUESTION PRESENTED HEREIN HAS NOT BEEN DECIDED BY THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT IN A MANNER INCONSISTENT WITH DECISIONS OF THE SUPREME COURT.

More than sixty-five years ago this Court, in considering a case where counsel appealed to the regional bias of the jury, remarked that such comments, and others of similar character, have been "so often condemned as an appeal to . . . prejudice as to require no comment." New York Cent. R. Co. v. Johnson, 279 U.S. 312, 319 (1929). Two years later, this Court again considered the issue of appeals to regional bias by counsel and held, "In actions under the federal statute no verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice." Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Moquin, 283 U.S. 520, 521 (1931). That comments appealing to regional bias, as so strongly condemned by this Court, are less incendiary than direct appeals to racial prejudice is obvious.

Other courts that have considered appeals to the bias or prejudice of the jury have universally condemned the practice. e.g. United States v. Doe, 903 F.2d 16, 28 (D.C. Cir. 1990). (Reference in closing argument to defendants as Jamaicans held plain error - "Undeniably, prosecutorial remarks kindling racial or ethnic predilections can violently affect a juror's impartiality. Comments of the sort are especially egregious. . ."); United States v. Janis, 831 F.2d 773, 778 (8th Cir. 1987), cert. denied, 484 U.S. 1073, (remarks concerning Italians); United States v. Chase, 838

F.2d 743, 750 (5th Cir.) cert. denied, 486 U.S. 1035, (1988) (reference to "Colombians"); Brooks v. Kemp, 762 F.2d 1383, 1413 (11th Cir. 1985) (en banc), cert. denied, 478 U.S. 1022, (1986) ("Even if brief, use of race as a factor in closing argument is improper"); Rojas v. Richardson, 703 F.2d 186, 192 (5th Cir. 1983) reversed on other grounds 713 F.2d 116 (single reference to party as illegal alien is obvious and blatant appeal to racial and ethnic prejudice and is plain error); Gearhart v. Uniden Corporation of America, 781 F.2d 147, 153 (8th Cir. 1986) (reference to foreign parent corporation could prejudicially appeal to xenophobia). There is simply no doubt that appeals to the bias of the jury are totally out of place in a federal courtroom. Appeals which tend to create feelings of hostility are so plainly repugnant that their universal condemnation requires no comment. Pappas v. Middle Earth Condominium Association, 963 F.2d 534 (2nd Cir. 1992) (citing New York Cent. R. R. v. Johnson, 287 U.S. 310).

It is much too late in the day to treat lightly the risk that racial comments may fan the flames of racial bias and influence the verdict of the jury. United States v. Doe, supra at 21. That the racially polarizing comments in this case came from the Court rather than from counsel, significantly magnifies the error. A trial judge has a duty to maintain an atmosphere free from prejudicial comment. "A prejudicial comment from the bench is worse than all others because it has the air of official sanction." Rush v. Smith, et al., 56 F.3d 918, 921 (8th Cir. 1995) (en banc).

In the more subtle and indirect context of racially-based peremptory challenges, which are not overtly made to the jury, this Court has remarked, ". . . the Court has not only made itself a

party to the [biased act], but has elected to place its power, property and prestige behind the [alleged discrimination]. . . and in a significant way has involved itself with invidious discrimination." Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 624 (1991). These comments were not from an advocate, but from the court, which is to be fair and impartial in all circumstances. "A trial judge must be especially cautious and circumspect in language and conduct during a jury trial. The judge must be fair to all parties and not do or say anything that might prejudice either party in the eyes of the jury." Coast to Coast Stores v. Womack-Bowers, 818 F.2d 1398, 1401 (8th Cir. 1987). More than a century ago, this Court recognized the vital role a judge plays during a jury trial and explained the need for a strict standard of judicial conduct." It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his slightest word or intimation is received with deference, and may prove controlling." Starr v. United States, 153 U.S. 614, 626 (1894); Accord Travelers Ins. Co. v. Ryan, 416 F.2d 362, 364 (5th Cir. 1969) ("By reason of his role, quickly observed by jurors, the trial judge is a figure of overpowering influence, whose every change in facial expression is noted, and whose every word is received attentively and acted on with alacrity and without question.")

Here, the appeal to bias was injected into the proceedings by a federal trial judge, robed in black, seated in a paneled courtroom, in a federal courthouse, in front of an American flag,

admonishing an all White jury that all the races have a tendency to stick together and that might in fact be good, or it might be bad.

The majority of the Eighth Circuit Appeals Panel characterized these comments as, ". . . beyond inappropriate: they egregiously and obnoxiously flaunt even minimal standards of judicial propriety and integrity . . . behavior that has no place in the courts of the United States," Rush v. Smith, et al., supra at 1202 (panel decision). The dissent characterized the comments about racial solidarity as: "reprehensible" "such insidious notions have no place in society, let alone our courtrooms." "Completely intolerable." Id. at 1204, 1207. The majority of the Eighth Circuit En Banc decision characterized the comments as "aberrant behavior" "outrageous" "completely intolerable," Rush v. Smith, et al., supra at 921, 922, 923. As previously noted, research has disclosed no other cases where a federal trial judge has directed racial remarks to a jury. Not only is the error magnified because it was the court, rather than counsel, that made the comments, but also, the error is magnified because of the inherently biased nature of the comments themselves. This was not the usual case of excessive questioning of witnesses or an improper comment on evidence. These comments went well beyond any issue in, or the merits of, the case. The comments of the trial court regarding racial solidarity could well suggest to the jury that Rush and his witnesses gave a consistent account of the shooting incident because of their race, different from the jurors, rather than their sworn duty to truthfully relate the circumstances under oath. The jury might also have reasonably interpreted these comments as a directive from the trial judge that it might be inappropriate to

decide the case along racial lines. These comments strike at the very heart and core of basic fairness and the integrity of judicial proceedings.

It is beyond dispute that "a fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." In Re Murchison, 349 U.S. 133, 136 (1955). In Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980), this Court recognized that the "requirement of neutrality in adjudicative proceedings" serves dual interests of equal importance, as "it preserves both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done." In order to perform its high function in the best way "justice must satisfy the appearance of justice." Murchison, supra, at 136 (quoting Offut v. United States, 348 U.S. 11, 14 (1955). The limits of tolerance for inappropriate comments to the jury appealing to bias or prejudice is defined not only by case law, but also by that fundamental sense of fairness that guides our system of justice. Pappas v. Middle Earth Condominium Ass'n., supra at 539.

Here, the comments of the trial court were different from all other cases located where commentary by the court was called into question. This difference, where comments appeal to racial bias or prejudice, is not one of degree, but of kind as they induce a wholly different magnitude of prejudice. Rush v. Smith, supra at 922 (en banc); United States v. Doe, supra at 26. The focus of appellate review in all cases involving pleas to the bias of the

jury is whether potential prejudice exists. Pappas v. Middle Earth Condominium Ass'n, supra at 540.

Cases which have considered counsel's inappropriate appeals to the prejudice or xenophobic tendencies of the jury have held that it is only the possibility of prejudice that is required for reversal. Id. at 541 (appeal to regional bias so inherently improper as to raise the distinct possibility regionalism infected the trial); Rojas v. Richardson, supra at 190, (single reference to party as illegal alien - obvious and blatant appeal to racial and ethnic prejudice could have placed a prejudicial gloss); Gearhart v. Uniden Corporation of America, supra at 153 (reference to foreign corporation could prejudicially appeal to xenophobia); Hong v. City of St. Louis, 698 F.Supp. 180, 182 (E.D. Mo. 1988) (reference to party's position with government of China could have prejudicially appealed to xenophobia). The reason courts have applied this standard of review is because of the extreme volatility of such comments coupled with their total repugnancy to concepts of justice and the near impossibility of establishing actual prejudice.

When constitutional error calls into question the objectivity of those charged with rendering a judgment, a reviewing court cannot assume regularity, nor can it evaluate the resulting harm. When there is some basis for believing a biased judgment may have been rendered, actual motivations are hidden from review and it must be presumed the process was tainted - there must be a reversal because the effect of the violation cannot be ascertained. This is the only effective remedy for such a violation. Vasquez v. Hillery, 474 U.S. 254, 263 (1986). Whether inappropriate remarks

result in actual prejudice can only be determined by examination into the state of mind of each individual juror. United States v. Bland, 697 F.2d 262, 266 (8th Cir. 1983); Rush v. Smith, supra at 923 (en banc) (because of the impracticality of determining the effect of the racially-divisive remark on the jury, makes requiring a showing of actual prejudice tantamount to declaring such egregious comments unreviewable). The near, or actual, impossibility of determining whether or not the jury was infected by actual prejudice in this case is further complicated by U. S. District Court, Eastern District of Missouri Local Rule 16(d), which prohibits counsel from interviewing a juror unless specifically ordered to do so by the court.

Here, the double barrel contaminant of racially divisive remarks addressed directly to the jury by the trial court is so egregious and the likelihood of prejudice so great, that this is the type of matter which should clearly come within that rare category of plain error recognized by this court in United States v. Olano, 113 S.Ct. 1770, 1778 (1993), that can be corrected regardless of the effect on the outcome of the trial. This was not a mere "trial error" as urged by Petitioner. In Arizona v. Fulminante, 499 U.S. 279 (1991), this court, in a criminal case, distinguished between "trial error" and "structural defects" for the purpose of plain error analysis. Trial error is said to be "error which occurred during presentation of the case . . . which may therefore be quantitatively assessed in the context of other evidence." Id. at 307. The majority of the cases cited by this Court as constituting trial error involved erroneous admission of evidence or inappropriate jury instructions. None involved trial

court comments appealing to the xenophobic tendencies of the jury. Id. at 306-307. Trial error is fundamentally different from structural defects in the constitution of the trial mechanism. Examples of structural error defying harmless error analysis are: the presence on the bench of a judge who is not impartial and unlawful exclusion of members of defendant's race from a grand jury. Id. at 309. Here, the comments of the trial court did not involve the presentation of evidence and are not subject to quantitative analysis with other evidence in the case. Vasquez v. Hillery, supra at 263; United States v. Bland, supra at 186. That such incendiary comments can violently affect a juror's impartiality and infect the entire proceeding is obvious. The probability of that occurring is intensely heightened when such egregious comments have the aura or stamp of official sanction.

> Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. . . [it] destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process. . . such discrimination not only violates our Constitution and the laws enacted under it, but is at war with our basic concepts of a democratic society and representative government.

Rose v. Mitchell, 443 U.S. 545, 555, 556 (1979).

The bias conveyed to the jury via the judge's racially-divisive comments was not the only problem concerning the African-American juror. It was also error for the Court to excuse her in the first place. Her only problem with attendance was a transportation problem due to inclement weather and her desire not to come out in bad weather. See U.S. v. Tabacca, 924 F.2d 906, 914-915 (9th Cir. 1991) (abuse of discretion to discharge juror

with transportation problem, rather than continue case for one day). When her transportation problems became apparent, the judge recognized that her absence was likely to be detrimental to Rush. (R. Vol. IV, 4-5). At the onset, this elderly lady was empaneled due to the importance that Rush be racially represented on the jury. Jurors may not, of their own volition, decide whether or not they will serve. The Clerk of the United States District Court summons jurors from their employment or other pursuits, their freedom of movement is constrained and they are subject to public scrutiny and examination. Once the jury is sworn, absent extreme circumstances, it is the right of the litigants to have the jury in whole remain and consider the case. Although she was initially placed on the jury as a result of an objection to Defendants' exercise of a peremptory strike and the judge was fully aware that her absence would benefit of defendants, he refused to allow the marshall to pick her up, refused to send a cab, refused to allow Plaintiff to arrange transportation and dismissed her, rather than allow for a short continuance. The protections of Batson v. Kentucky, 476 U.S. 79 (1986) and Edmonson v. Leesville Concrete Co., Inc., supra, ring hollow and evaporate in these circumstances.

The trial court's unwillingness to have court personnel pick up the African-American juror, and refusal to allow alternate transportation, coupled with his subsequent admonition to the remaining all White jury that he would use court personnel to ensure that they were in attendance, may well have magnified the court's racially polarizing comments.

Because discrimination on the basis of race in the context of a jury strikes at the most fundamental values of our judicial

system and our society as a whole, this Court has reversed cases where such has been found to exist without any inquiry as to whether a party was actually prejudiced. Rose v. Mitchell, supra; Vasquez v. Hillery, supra (and the cases cited therein.) Thus, for more than a century, this Court has recognized that racial bias in the context of jury formation will be corrected without regard to prejudice. Id. The result should be no different where the insidious racial bias is implanted in the jury through racially divisive comments of the trial court. Although U.S. v. Olano did not address which cases fit that special category of plain error where no showing of prejudice is necessary for reversal, this Court has previously determined that the case at bar is of the character which this Court will correct without regard to prejudice or effect on the outcome. Rose v. Mitchell, supra, Vasquez v. Hillery, supra.

Although the Eighth Circuit, in its en banc decision, did not explicitly recite the standards set forth in U.S. v. Olano, they are implicit within the majority opinion. In concluding that the impracticality of determining what effect the racially divisive remark had on the jury, requiring a showing of actual prejudice, would be tantamount to declaring such remarks unreviewable and that the potential for prejudice was so great that no showing of actual prejudice was required, the Eighth Circuit cited Olano for the proposition that some forfeited errors may be corrected regardless of their effect on the outcome. Rush v. Smith, supra at 923 (en banc). The court further noted, citing Olano, that some errors should be presumed prejudicial if a specific showing of prejudice cannot be made. Id.; See also Rose v. Mitchell, supra; Vasquez v.

Hillery, supra. Whether the majority intended its opinion as stating these remarks were so egregious as to effect the structure of the proceeding such that no showing of prejudice is necessary, or that on the facts of this case a presumption of prejudice arises, is really of no import as the result is the same - no inquiry is made as to whether a party was actually prejudiced. Rose v. Mitchell, supra, Vasquez v. Hillery, supra.

> . . . it would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated. Judges do not inhabit an ivory tower. Like others, we know that some members of any racial group acting as decision makers in a dispute between a person of their own race and a person belonging to another race may tend to favor those who are like themselves over those who are different. . . The Constitution cannot control such prejudices, but neither can it tolerate them . . . Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.

Edmonson v. Leesville Concrete Co., Inc., 860 F.2d 1308, 1314 (5th Cir. 1988).

Be that as it may, the dissent[4] in the Eighth Circuit en banc decision argues that to reverse for plain error, Rush must establish a threshold showing that a high risk of prejudice existed in the circumstances of the present case, or must show specific prejudice. Rush has clearly done so.

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[4] The dissent notes that there is no allegation that the judge was actually biased or lacked impartiality. Rush v. Smith, supra, 927 Note 3. However, as this Court noted in Vasquez v. Hillery, supra at 263, ". . . his actual motivations are hidden from review, and we must presume the process was impaired." Nor is it any consolation to one denied the equal protection of the laws that it may have been done in good faith. Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961).

Even the dissent in the Eighth Circuit en banc decision concedes that the first two elements of the Olano test are met: there was an error and the error was plain. Rush v. Smith, supra at 925 (en banc). The dispute was as to the third element: that the error affected substantial rights. U.S. v. Olano, supra at 1777, 1778.

A review of the evidence and a comparison of witness credibility shows not only that Rush has met the threshold of showing of a high risk of prejudice such as to raise a presumption of prejudice, but also that there was a substantial likelihood that the jury was actually infected with bias through the trial court's racially charged remarks.

The night the incident occurred was cold, and there was light snow on the ground. The police officers involved were wearing heavy jackets. With the exception of a light pair of pajama bottoms, Rush was naked. Although the officers maintained Rush was shot while outside, no blood was found in the snow. Not a single witness could identify Rush as one of the two individuals allegedly in the rear yard.

The officers testified that, from their vantage point, they could clearly determine the color of the suspect's trousers. This was starkly refuted by the police department's own evidence: the photograph of Smith and Hardison standing behind the vine covered fence where their trousers could not be seen - the evidence officer testified there was no reason to take the photograph other than to depict where the alleged suspects were standing, and which the trial court recognized as an obvious reenactment.

Both officers testified that they were under direct fire and that anywhere from 25-31 rounds from a 12-gauge shotgun were fired directly at them. Yet, incredibly, no investigating officer could find the slightest amount of damage attributable to this massive amount of firepower. The shotgun would not even function in the manner the officers testified - this was established by their own expert.

Smith's testimony was simply unworthy of belief. When confronted by the prosecutor with the fact that his account was inconsistent with the physical evidence, he was more than willing to change his account of the incident. He moved Rush from the outside rear yard to inside the kitchen in his attempt to assure prosecution. Smith was afraid he would be sued if Rush was not sent to jail. The St. Louis Circuit Attorney dismissed all charges against Rush due to the inconsistency of the physical evidence with the police version of the incident - and, presumably, because of Smith's lack of credibility. Smith was, again, willing to change his testimony under cross-examination and admitted Rush may well have been inside the kitchen of his home when shot.

Rudderforth's testimony was wholly incredible. The jury would have to credit her with x-ray vision, given her ability to see through parts of buildings and other physical obstructions in the middle of the night, which photographic evidence from two separate sources established could not be seen in the brightness of daylight. Her testimony that the police knew that her boyfriend, who was present at her home when she was interviewed, had outstanding felony warrants for child molestation but the police

chose not to arrest him is more than mildly suggestive that some type of deal was struck for her testimony.

In contrast, Rush and his occurrence witnesses, all of whom were African-American, testified consistently with each other, consistent with their statements given to the police, and consistent with the physical evidence - which does not have the ability to perjure itself.

The uncontradicted medical evidence supported Rush's version that he was bent at the waist when shot, and was contrary to the police version that Rush was standing upright when shot.

The physical evidence of the bullet holes and recovered bullet projectiles strongly supported Rush's version of the incident and was clearly inconsistent with Smith's version. There was no evidence presented that the critical hole through the screen, or middle portion, of the storm door was anything other than a bullet hole from a projectile fired by Smith. Even the special police Internal Affairs investigation confirmed this as a bullet hole, and Defendants' expert could offer no opinion that it was not.

In order for the jury to return a verdict for Defendants, it had to disregard the substantial credibility problems with Defendants' main witnesses and ignore the clear physical evidence. That the verdict was influenced by egregious, racially divisive remarks of the trial court is more than a mere possibility - certainly, at a minimum, the facts and circumstances of this case constitute a threshold showing that a high risk of prejudice was present.

The Court of Appeals for the Eighth Circuit simply did not depart from prior precedent in deciding that the racially divisive

comments of the trial court constituted plain error in the circumstances of this case.

II. THE PETITION SHOULD BE DENIED BECAUSE THERE IS NO DIVERGENCE OF THE COURTS OF APPEALS ON THE QUESTION PRESENTED HEREIN.

Research has disclosed no other cases where a federal trial judge has made racially divisive comments appealing to the xenophobic tendencies of the jury. As noted in the previous section, comments appealing to bias or xenophobia have met with universal condemnation.

A principle purpose for which this Court uses certiorari jurisdiction is to resolve conflicts among Circuit Courts of Appeal. Braxton v. United States, 500 U.S. 344, 347 (1991). The scarce judicial resources of this Court should not be consumed by a grant of certiorari to review the egregious commentary of the trial court in this case when there is, in fact, no conflict among the Circuit Courts of Appeal.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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